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Measures to eliminate international terrorism

Security Council
Fifty-sixth year

Letter dated 8 October 2001 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General

I wish to draw your attention to the latest incident in the ongoing Palestinian campaign of terrorism directed against Israel.

Yesterday morning, at approximately 8.15 a.m. (local time), Yair Mordechai, age 44, was returning to Kibbutz Shluhot when he spotted a suspicious-looking Palestinian by the side of the road. When Mordechai pulled over to question him, the terrorist detonated an explosive he was wearing on his belt. The blast killed Mordechai and completely destroyed his vehicle.

The murder of Yair Mordechai is the latest attack in an ongoing Palestinian terrorist campaign that has been detailed in my letters dated 5 October 2001 (A/56/444-S/2001/943), 3 October 2001 (A/56/438-S/2001/938), 24 September 2001 (A/56/406-S/2001/907), 20 September 2001 (A/56/386-S/2001/892), 17 September 2001 (A/56/367-S/2001/875), 7 September 2001 (A/56/346-S/2001/858), 4 September 2001 (A/56/331-S/2001/840), 30 August 2001 (A/56/325-S/2001/834), 27 August 2001 (A/56/324-S/2001/825), 13 August 2001 (A/56/294-S/2001/787), 9 August 2001 (A/56/286-S/2001/780), 8 August 2001 (A/56/280-S/2001/775), 6 August 2001 (A/56/272-S/2001/768), 27 July 2001 (A/56/225-S/2001/743), 26 July 2001 (A/56/223-S/2001/737), 17 July 2001 (A/56/201-S/2001/706), 13 July 2001 (A/56/184-S/2001/696), 3 July 2001 (A/56/138-S/2001/662), 2 July 2001 (A/56/131-S/2001/656), 21 June 2001 (A/56/119-S/2001/619), 19 June 2001 (A/56/98-S/2001/611), 18 June 2001 (A/56/97-S/2001/604), 13 June 2001 (A/56/92-S/2001/585), 11 June 2001 (A/56/91-S/2001/580), 4 June 2001 (A/56/85-S/2001/555), 30 May 2001 (A/56/81-S/2001/540), 25 May 2001 (A/56/80-S/2001/524), 18 May 2001 (A/56/78-S/2001/506), 11 May 2001 (A/56/72-S/2001/473), 9 May 2001 (A/56/69-S/2001/459), 1 May 2001 (A/55/924-S/2001/435), 23 April 2001 (A/55/910-S/2001/396), 16 April 2001 (A/55/901-S/2001/364), 28 March 2001 (A/55/863-S/2001/291), 27 March 2001 (A/55/860-S/2001/280), 26 March 2001 (A/55/858-S/2001/278), 19 March 2001 (A/55/842-S/2001/244), 5 March 2001 (A/55/821-S/2001/193), 2 March 2001 (A/55/819-S/2001/187), 14 February 2001 (A/55/787-S/2001/137), 13 February 2001 (A/55/781-S/2001/132), 2 February 2001 (A/55/762-S/2001/103), 25 January 2001

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(A/55/748-S/2001/81), 23 January 2001 (A/55/742-S/2001/71), 28 December 2000 (A/55/719-S/2000/1252), 22 November 2000 (A/55/641-S/2000/1114), 20 November 2000 (A/55/634-S/2000/1108) and 2 November 2000 (A/55/540-S/2000/1065).

The State of Israel holds chairman Arafat and the Palestinian leadership responsible for this attack in the light of their unending incitement to violence and terrorism, their support and assistance for known terrorist groups, and their refusal to take sustained and concrete measures to end terrorism against Israelis. The Palestinian leadership has also encouraged terrorism by releasing convicted terrorists from prison, assisting them in carrying out their deadly missions, and providing them with safe harbour in Palestinian-controlled territory.

Despite Chairman Arafat's recent call for a ceasefire, attacks against Israeli civilians have escalated in recent days. The Palestinian leadership's preference for words over actions, its failure to take measures to impede the freedom of terrorists operating in the territory under its control, and its continuing use of the official Palestinian media to incite the population are directly responsible for the failure of the ceasefire.

Israel again calls on the Palestinian leadership to adhere to its commitment to renounce the use of violence and terrorism and to control and punish those who continue to engage in such practices. Israel further calls on the international community to compel the Palestinian Authority to associate itself, in both word and deed, with those actively opposing terrorism by preventing Palestinian territory from being used as a base for terror operations.

I should be grateful if you would arrange to have the text of the present letter circulated as a document of the fifty-sixth session of the General Assembly, under agenda item 166, and of the Security Council.

(*Signed*) Yehuda **Lancry**
Permanent Representative

United Nations A/56/451–S/2001/953

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Agenda item 62
Question of Cyprus

Security Council
Fixty-sixth year

Letter dated 5 October 2001 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General

I have the honour to transmit herewith a letter dated 4 October 2001, addressed to you by His Excellency Mr. Aytuğ Plümer, Representative of the Turkish Republic of Northern Cyprus (see annex).

The enclosure to Mr. Plümer's letter contains the "Further Opinion" by Professor Maurice Mendelson, QC, on the unilateral application of the Greek Cypriot administration to join the European Union, which he finds to be illegal.

Professor Mendelson, who is among the most respected international lawyers, has prepared the further opinion at the request of both the Government of the Republic of Turkey and the Government of the Turkish Republic of Northern Cyprus.

The legal opinion comes at a time when the accession negotiations with the Greek Cypriots are making progress. As you will see in paragraph 44 of his further opinion, Professor Mendelson confirms his earlier opinion on the subject, which was circulated as a document of the General Assembly and of the Security Council in 1997 (A/51/951-S/1997/585). He concludes that to apply to join or to join the European Union is a breach of international legal obligations of "Cyprus", in particular of article I of the Treaty of Guarantee of 1960, as well as the internationally guaranteed Constitution of the 1960 partnership Republic of Cyprus.

Professor Mendelson also concludes that the United Kingdom of Great Britain and Northern Ireland and Greece are obliged by the 1960 Treaties to veto the accession of Cyprus to the European Union. He further confirms that if the Greek Cypriots were to be admitted to the European Union without the political problems having been resolved, the practical effect would probably be that the entity admitted would be unable to fulfil its obligations towards the other members, and similarly that the other members would be unable to carry out their obligations towards the whole of the Island and its inhabitants.

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I should be grateful if the text of the present letter and its annex would be circulated as a document of the General Assembly, under agenda item 62, and of the Security Council.

(*Signed*) Ümit **Pamir**
Ambassador
Permanent Representative

Annex to the letter dated 5 October 2001 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General

I have the honour to enclose herewith the text of the "Further Opinion" dated 12 September 2001, prepared by Professor M. H. Mendelson, Q.C., on the illegal and unilateral application of the Greek Cypriot administration for accession to the European Union, and its annexes (see enclosure).*

The opinion has been prepared at the request of both the Government of the Turkish Republic of Northern Cyprus and the Government of Turkey.

Professor M. H. Mendelson is a prominent international jurist specializing, inter alia, in European Union law concerned with public international law, including legal personality, status of territory and eligibility for membership, as well as State succession.

(*Signed*) Aytuğ **Plümer**
Representative
Turkish Republic of Northern Cyprus

* The enclosed document and its annexes are being circulated in the language of submission only.

FURTHER OPINION OF PROFESSOR M. H. MENDELSON Q.C. ON THE APPLICATION OF THE REPUBLIC OF CYPRUS TO JOIN THE EUROPEAN UNION

1. In June 1997 I wrote an Opinion, at the request of the Government of Turkey, on the application by the Greek Cypriot authorities in Cyprus to join the European Union.[1] I came to the conclusion that membership would be contrary to the international obligations of Cyprus and that it would be contrary to the treaty obligations of Greece and the United Kingdom to assist in the acquisition of such membership. In July of the same year I wrote a Supplementary Opinion refuting the argument, which had been raised in some quarters, that the admission of Austria to the European Union was a precedent to the contrary.[2] In October of the same year the Greek Cypriot Government caused to be circulated a Joint Opinion by Professors James Crawford, Gerhard Hafner and Alain Pellet, which *inter alia* sought to contest my views and came to the contrary conclusion.[3]

2. I have now been asked by the Turkish Government and the Government of the Turkish Republic of Northern Cyprus for my reactions to the Joint Opinion. I should perhaps point out that, if this response has been long in coming, it is not due to the difficulty of countering the arguments advanced in the Joint Opinion, but rather to developments which prevented its being requested until now. For the reasons indicated below, none of the arguments deployed in the Joint Opinion lead me to revise my conclusions.

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[1] Circulated, at the request of Turkey, on 25 July 1997 as UN document A/51/951-S/1997/585. The Opinion is reproduced at Annex I of the present Further Opinion.

[2] Annex II hereto. Hereinafter, unless the context otherwise requires, references to "my Opinion" includes the Supplementary Opinion.

[3] 17 October 1997, UN doc. A/52/481-S/1997/805.

3. Although the Joint Opinion is *in substance* a reply to my Opinion, this is not the form it takes. Rather, it purports to be a general study of the subject dealing "where they are relevant" with my views. The authors were of course free to adopt any style of presentation they chose, and I make no criticism of that. I would simply point out, though, that this approach has led to two somewhat unfortunate consequences, as will be demonstrated below. First, because the authors have absolved themselves from commenting on my Opinion as such, it enables some of my arguments to be misdescribed, minimized or omitted. Secondly, it enables the authors to set up "straw men" – hypothetical arguments against their position not made by me – which they can easily demolish.

4. For the convenience of the reader, rather than commenting paragraph by paragraph on the Joint Opinion, I shall here set out the main points of my analysis, take into account the comments made in the Joint Opinion and comment on them where appropriate. I shall not repeat all of the points made in my original Opinion, insofar as the Joint Opinion does not take issue with them; but for ease of reference I annex my original Opinion, my supplementary Note on Austria's accession to the EU.[4]

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[4] The first part of my original Opinion (paragraphs 3-76) set out the background facts which I considered necessary or useful to the exposition. In footnote 8 of the Joint Opinion, the authors state that most of my assertions of fact are based on Z.M. Necatigil [misspelt in the Joint Opinion], *The Cyprus Question and the Turkish Position in International Law* (2nd ed., 1996), which they describe as "a work of doubtful objectivity since the author was 'Attorney-General of the Turkish Republic of Northern Cyprus'". In fact, when first citing this work in my Opinion (footnote 2), I observed: "Although this author, as a high official in the Turkish Cypriot administration, may be thought to be *parti pris*, his account of the facts which I have cited here appears to be accurate. So far as the legal analysis is concerned, most of the authors whose writings I have examined are anxious to advance a particular point of view: for my part, I have attempted to reach my own independent conclusions." The Joint Opinion does not indicate in what respects my factual account is questionable, which is not surprising, since it is largely a history of the evolution of the various legal instruments involved, and as to the rest an impartial and dispassionate account of what seem to be incontrovertible facts. It is, indeed, notable that the statements contained there do not seem to be controverted to any significant degree even in a recent detailed, though highly partisan, study by a Greek Cypriot author: K. Chrysostomides, *The Republic of Cyprus: a Study in International Law* (2000). As to his legal analysis of the question of accession to the EU, and in particular the issues raised by my Opinion, he traduces

5. There is a preliminary point which I should mention here. Part of the Turkish Cypriot case is that the Greek Cypriot authorities are not entitled to speak for the whole island, especially now that the Turkish Republic of Northern Cyprus (TRNC) has been established. The Greek Cypriot position is, unsurprisingly, that the TRNC has no legal existence, and that they alone are entitled to speak (and *inter alia* to apply for EU membership) on behalf of the whole island (except the British Sovereign Base Areas). Deliberately, neither my original Opinion nor the present one enter into this controversy: in my view, even if one were to accept, for the sake of argument, the hypothesis that the regime in the south of Cyprus is the sole sovereign authority on the island, the Treaty of Guarantee in particular prohibits Cyprus joining the EU, unless all the parties to it, including Turkey, consent.[5]

THE TREATY OF GUARANTEE

6. The terms of the Treaty of Guarantee (TG), between the Republic of Cyprus (RC) on the one hand and Greece, the United Kingdom and Turkey on the other, were agreed at the 1959 London Conference.[6] The actual treaty itself was signed at Nicosia and came into force only on 16 August 1960, the date

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my reasoning by excessive abbreviation and then contents himself with reiterating the substance of the Joint Opinion.

[5] The Greek Cypriot authorities and others sharing their standpoint often put inverted commas around the name "Turkish Republic of Northern Cyprus", in order to indicate that in their view this is, legally, a fictitious entity, Likewise, the authorities of the TRNC and some writers sympathetic to their position put inverted commas around the expression "Republic of Cyprus", to indicate that, in their view, the current regime in South Cyprus does not have the authority to speak in the name of the whole island. But clearly this does not, on any view, apply to the original signatory of the Treaty of Guarantee, whatever may be the current position. And consistently with the hypothesis indicated in the text accompanying this footnote, I have not used inverted commas to designate either authority.

of the independence of Cyprus.[7] The treaty was drawn up in English and French, both texts being equally authoritative, and remains in force[8] - a fact not disputed in the Joint Opinion. The key provisions are as follows.[9]

Article I

The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution.

It undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited all activity likely to promote, directly or indirectly, either union with any other State or partition of the Island.

Article II

Greece, Turkey and the United Kingdom, taking note of the undertakings of the Republic of Cyprus set out in Article I of the present Treaty, recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution.

Greece, Turkey and the United Kingdom likewise undertake to prohibit, so far as concerns them, any activity aimed at promoting [Fr. ayant pour but de favoriser], *directly or indirectly, either union of Cyprus with any other State or partition of the Island.*

The correct interpretation of the second paragraphs of each of these articles, and especially of Article I, is the principal source of contention.

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[6] For more details regarding the London draft see my previous Opinion, paras 19-33.
[7] UK Treaty Series No 5 (1961), Cmnd. 1253.
[8] The UK Government has accepted this explicitly. See Parliamentary Written Answers, Wed 30th July 1997 (www.open.gov.uk, Written Answers, 30 Jul. 1997, col. WA 37). Lord Monson asked Her Majesty's Government "Whether they and (to their knowledge) the United Nations consider the following still fully in force, and binding upon the High Contracting Parties: (1) The 1960 Treaty Concerning the Establishment of the Republic of Cyprus (Cmnd 1252). (2) The 1960 Cyprus Treaty of Guarantee (Cmnd 1253), and the Basic Articles of the Constitution of Cyprus guaranteed therein." Baroness Symons of Vernham Dean replied: "We consider both treaties to be in force. We believe the UN shares this view." It is my understanding that all other parties to the TG, as well as bodies like the UN Security Council, do indeed share this view. See further, paras. 78-93 of my Opinion.
[9] The equally authoritative French text does not differ in any relevant respect from the English or throw additional light on it, except as indicated.

7. I agree with the authors of the Joint Opinion (para. 9) that Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969, though not retrospective, also sets out the customary international law rules of interpretation of treaties for present purposes. They provide as follows.

Article 31 – General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.
2. The context for the purposes of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made by one or more parties in connexion with the conclusion of the treaty;
   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 – Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

8. Where the authors of the Joint Opinion and I differ is on the application of these rules of interpretation to the text of the Treaty of Guarantee. Even they, however, accept that the starting point has to be the treaty language in its ordinary meaning, and so I shall begin by looking briefly at some of the key terms before going into more detail about the means by which they seek to circumvent that ordinary meaning.

9. ***"any political or economic union".*** This phrase appears in Article I(2) of the TG. Clearly the word "union" in the second sentence of this paragraph and in Article II(2) is meant to bear the same meaning, as the phrase in one paragraph is part of the context of the other, and vice versa. Cf. also the principle of interpretation *noscitur a sociis.* The expression is "political *or* economic union". Economic union is usually a less close form of unity than political union. The EU is indisputably an economic union, as well as (increasingly) a form of political union.

10. ***"Cyprus ... undertakes not to participate, in whole or in part, in any political or economic union".*** The expression (in Article I(2)) "participate" in a union, rather than "form" a union, would in its ordinary meaning include something less than a full merger, economic or political. This is amply confirmed by the further phrase "in whole or in part". This makes it abundantly clear that even partial union is prohibited.

11. ***"likely to promote, directly or indirectly".*** This phrase is to be found (with irrelevant variations) in both Article I(2) and Article II(2). This language makes it clear that it is not only the direct accomplishment of economic or political union (complete or partial) which is prohibited, but *any* activity which is aimed at or likely to lead to either type of union, directly or indirectly; and this applies to partial as well as total union.

12. ***"with any other State whatsoever"***. The meaning of this phrase, which is found in Article I(2), plainly extends also to the phrase "any other State" which is found later in the same paragraph and in Article II(2). The Joint Opinion seeks to reinterpret this language (as we shall see) to mean "Greece or Turkey" – and only one or other of them; but this is not what the Treaty says. It is of course indisputable that (apart from partition), the primary objective of these and other provisions was to avoid the union of Cyprus with Greece or Turkey. But not necessarily the only objective, for otherwise the Treaty could easily have said: "Cyprus ... undertakes not to participate ... in any political or economic union with either Greece or Turkey". Instead, it said "with any State *whatsoever*". The plain meaning of the text, therefore, is that union with *any* other State is prohibited. So union with, say, the United Kingdom (the recent colonial power) or Italy (Venice having ruled Cyprus long ago), would equally have been prohibited. The same language had been used in the draft TG, and the Turkish Foreign Minister, with whom his Greek counterpart agreed, expressly said that the language was designed to exclude *enosis* "either with Greece or with any other country".[10]

13. The Joint Opinion makes much of the fact that the singular "State" is used, and points out that there are now fifteen members of the EU. But there are three reasons why this argument does not seem convincing. First, to use the plural too would have been unnecessary. In legal drafting in English, a phrase like "any State whatsoever" or "any other State" would automatically

[10] See para. 7 of my Opinion.

embrace the plural, unless the contrary was stated or clearly intended.[11] Likewise in French – the language in which the TG had originally been drafted at Zurich and the "equally authoritative" second language of the Treaty of Guarantee itself - "avec quelque Etat que ce soit" – certainly encompasses the possibility of an agreement with more than one other State. Secondly, as a matter of style, to say "any other State or States whatsoever" would have seemed awkward, to say the least; whilst in French, "avec un ou d'autres Etats quels qu'ils soient" or something similar would have been even more awkward. Thirdly, there is nothing in the context or object and purpose of the TG which would suggest that it was intended to confine the prohibition to union with a single State. Suppose, for instance, that Cyprus had wanted to enter into a tripartite union with Greece and Malta, it seems clear that this would have been regarded by the drafters as inconsistent with the prohibition in question, because it would have led to union with Greece as well as with Malta. Similarly if one substitutes for the third State one which was stronger than Greece (or Turkey), not weaker: little imagination is need to imagine what would have been the reaction to an tripartite political quasi-union between Cyprus, Greece and France, or a tripartite

[11] The UK's Interpretation Act 1978 (c.30), s.6 provides, for instance, "In any Act, unless the contrary intention appears ... (c) words in the singular include the plural and words in the plural include the singular." Similarly the Code of the Laws of the United States of America: 1 USC, sect. 1 (1982): "words importing the singular number may extend and be applied to several persons or things; (and) words importing the plural number may include the singular..." Also see US cases: *First Nat. Bank in St Louis v Missouri*, 263 US 640, 68 L Ed 486, 44 S Ct 213 (1923); *Johnson v Penrod Drilling Co.*, 803 F.2d 867 (CA, 5th cir., 1986). The primary authority in Australia is the Privy Council decision of *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651 – which reads at 656: "It follows that the mere fact that the reading of the words in a section suggests an emphasis on singularity as opposed to plurality is not enough to exclude plurality. Words in the singular will include the plural unless the contrary intention appears." In civil law systems, I understand, the result is similar though the technique is different, since the judge has a freer hand in interpretation.

economic union between Cyprus, France and Turkey. In short, there is no reason to imagine that the singular "State" excludes the plural in the TG.

14. Thus, the ordinary meaning of the words used in the TG, whether taken at face value or in the light of their context and object and purpose, support the view that membership of the EU would be incompatible with the TG, and that the Guarantors who are able to prevent it (Greece and the UK) are under an obligation not to facilitate the acquisition of such membership. But we must now look in detail at the arguments that the Joint Opinion deploys in order to circumvent this conclusion.

15. In order to circumvent the clear language of the TG, the Joint Opinion attempts to make a spurious distinction between acts likely to promote, directly or indirectly, economic or political union, total or partial, with any other State – or, I would add for the reasons explained, States –, on the one hand, and membership of an international organization, and specifically the EU, on the other, suggesting that membership of international organizations does not come within the purview of the prohibition.

16. First, spurious use is made of certain provisions of the Cyprus Constitution, incidentally misrepresenting or misunderstanding certain points I made in my Opinion relating to it. Paragraph 11 of the Joint Opinion draws a contrast between the language of Article I(2) and of certain parts of Articles 50 and 169 of the Constitution of Cyprus, which it takes out of context. When properly construed and understood, these provisions, so far from

supporting the views of Professors Crawford, Hafner and Pellet, actually undermine their position and support mine.

17. By way of introduction, I agree that the Constitution, which was concluded at the same time as the TG and is referred to in various provisions of the latter, including Article I(1), is part of the context of Article I (2) and the other relevant provisions of that Treaty. But what do the relevant provisions actually say? As I mentioned in my original Opinion,[12] Article 50 is one of the "Basic Articles" of the Constitution which, by virtue of Article 182 is (in pertinent part) stated to be unamendable. Article 50 gave the (Greek Cypriot) President and the (Turkish Cypriot) Vice-President a final veto, which could be cast either jointly or by *either one* of them, over a variety of matters related to foreign affairs, defence and security. In the list of subjects covered by this veto, we find, in paragraph 1(a) "foreign affairs, except the participation of the Republic in international organisations and pacts of alliance in which the Kingdom of Greece and the Republic of Turkey both participate". In other words, Cyprus could, without more ado, join an international organization if both Greece and Turkey were members: and if they were not, it could still join if neither the President nor the Vice-President cast his veto.[13] It is clear from this provision that international

[12] Paragraphs 34, 38, 98 & 109.

[13] Footnote 31 of the Joint Opinion raises what seems to me to be an irrelevant point, or perhaps one of its "straw men". Its authors point out that, in the passage in question, the reference to international organizations of which both Greece and Turkey was a member was obviously not intended to be exclusive, but illustrative, since neither State was a member either of the Commonwealth or the Sterling Area, which had been mentioned as organizations which Cyprus might eventually join. This does not add anything to the discussion, because it appears to be common ground between us that there were *two* exceptions to the prohibition in the TG, as stated in the text accompanying the present footnote.

organizations *are* covered by the TG and, if both of the two named States are *not* members of the organization, by the veto. Article 169 (which is expressly stated to be subject to Article 50) is concerned with *who* is to conclude treaties, and what is to be their effect in domestic law. It is not relevant here. It makes a distinction between (1) "international agreement[s] with a foreign State or [with] any International Organisation relating to commercial matters, economic co-operation (including payments and credit) and *modus vivendi*", which are to be concluded "under a decision of the Council of Ministers", and, on the other hand, (2) "any other treaty, convention or international agreement" which requires not only a decision of the Council of Ministers, but also approval by a law made by the House of Representatives. Plainly, the purpose of paragraph (1) is to provide a more expeditious means of concluding treaties of an economic character by dispensing with the need for parliamentary approval and legislation, and it casts no light on the meaning of the key terms of Article I (2) of the TG.

18. Returning to Article 50 of the Constitution, which is thus the relevant provision, its genesis was explained in paragraphs 7, 14, and 34 of my Opinion. At a meeting at the UK Foreign Office on 12 February 1959,[14] attended by the Foreign Ministers of Greece, Turkey and the UK, a number of questions were asked about a draft that was to become Article I(2) of the TG. The UK Foreign Secretary asked whether "the second paragraph of Article 1 [was] intended to preclude Cypriot membership of all international associations, as for example the

[14] Record of a Meeting held at the Foreign Office at 4 p.m. on Thursday, February 12, 1959 (UK Public Record Office, doc. FO/371/14460). The relevant passage is also quoted in paragraph 18 of the Joint Opinion.

> [European] Free Trade Area if that ever came into existence". The Turkish and Greek Foreign Ministers "both made it clear that there would be no objection to Cypriot membership of international associations of which *both Greece and Turkey were members* e.g. the [Universal] Postal Union, and any Free Trade Area. Nor did they exclude either Commonwealth membership for Cyprus or membership of the Sterling Area."[15] But it was also made clear that, in cases where Turkey and/or Greece were not members, it would only be if the leaders of the two communities agreed that the Republic could join.

19. Seen in context, then, the attempt in paragraph 11 of the Joint Opinion to use Article 50 of the Constitution to put a gloss on the prohibition in the Treaty of Guarantee by excluding membership of international organizations from its scope can be seen as entirely spurious. It was because those concerned considered that the wording of the (draft) Treaty of Guarantee *was indeed apt to cover international organizations of all sorts*, whether loose or closely-knit, that the question was posed and answered by saying that membership would not be precluded *if* (but only if) the conditions in what was to become Article 50 were met. In other words, the exception literally proves the rule, and this extract from the *travaux préparatoires* supports my position about the meaning of the language in Article I(2), not that of the authors of the Joint Opinion.

20. There were subsequent discussions between politicians and between officials about possible Cypriot membership in various international organizations. They were mainly focussed on whether membership of this or that organization was politically desirable (e.g. the North Atlantic Treaty Organization), and whether the organizations in question would accept Cyprus. But whilst these discussions certainly envisaged that Cyprus could become a member of various organizations, this is consistent with

[15] Emphasis added.

accession taking place in accordance with the procedures laid down in Articles 50 and 169 of the Constitution – and notably the failure of either the President or the Vice-President to cast a veto – and consequently does not mean that Article I(2) of the Treaty of Guarantee would not apply to membership of international organizations if the consent of the leaders of either community was not obtained. For instance, in a draft memorandum for the British Cabinet Official Committee on Cyprus prepared two weeks after the meetings described above, the pros and cons of Cyprus being associated with the Common Market was discussed. The analysis concluded with the following sentence: "A final, and probably conclusive, argument against Cyprus being associated with the Common Market is that Greece and Turkey are not so associated and are unlikely to be in the future".[16] I would not wish to attach too much weight to these observations, since it is not absolutely clear that those concerned were addressing the precise issue of the interpretation of the TG, as opposed to its application. But the same, in fairness, must be said of the Minutes of the 26th meeting of the Committee of Deputies of the London Joint Committee on Cyprus, which met on 19 October 1959,[17] part of which is quoted in paragraph 19 of the Joint Opinion. When representatives of Greece and Turkey reassured the leader of the Greek Cypriot delegation that it was certainly not intended that Cyprus should be precluded from membership of the Free Trade Area, FAO, GATT, or other multilateral organizations, this is entirely consistent with my interpretation.

21. I shall return below (paragraphs 36-38) to the assertion of the authors of the Joint Opinion that Article 50 of the Constitution is impossible to apply, because there is currently no Vice-President. For the moment, however, I wish to stress that, even if (purely for the sake of argument) they were correct as a matter of Cypriot constitutional law, this would not affect the point I am making here. Because my

[16] Public Record Office doc. BT 241/423, paragraph 52. Another memorandum in the same PRO file, headed "Cyprus Committee" and dated 8 April 1959 is to the same effect.
[17] PRO doc. FO 371/144653.

main point is not that application to join the EU would be *unconstitutional*, but that applying to or joining that organization would contravene the *Treaty of Guarantee's* prohibition against participating, in whole or in part, in any political or economic with any State whatsoever, and against any activity likely to promote, either directly or indirectly, such union.

22. Strictly speaking, then, in my opinion Article I(2) of the TG precludes membership of international organizations if the authorized exceptions by which that membership can be legitimately acquired are not respected. But even if this argument were, for any reason, to be rejected and it were held that membership of international organizations *in general* is not incompatible with the prohibitions contained in the TG, in my view the specific and exceptional nature of the EU means that it *would* come within the scope of the prohibition. Paragraphs 12-16 of the Joint Opinion contain a number of examples of false reasoning in this regard.

23. In paragraph 106 of my Opinion, I stated that "The very name of the organization, the European Union, bears out the fact that it is about union between the members." The authors of the Joint Opinion seek to counter this by pointing to the well-known fact that, particularly in the past, "union" has been a term used to describe even quite "ordinary" international organizations: examples are the Universal Postal Union[18] and the International Telecommunications Union. But this is entirely to misrepresent the significance of this term in the history of the European Union. It will be recalled that at first there was just a European Coal and Steel Community (1952). This was followed in 1958 by the coming into being of the European Atomic Energy Community and the European Economic Community. Although equipped with some supranational powers from the outset, initially these three Communities had a rather limited scope, both in the areas they covered and in the depth of their penetration into

[18] An instance which I cited myself.

national law. Gradually, however, these extended, particularly in the case of the EEC, which now embraces a great variety of matters and has very far-reaching powers. The 1965 Merger Treaty and a number of subsequent instruments converted what had been three separate Communities into a single one, with a single Commission, Council of Ministers, and Parliament. Subsequent developments, perhaps most notably the Maastricht Treaty on European Union, have resulted in ever-increasing integration not only economically, but also politically. For instance, to an immensely strengthened EEC there has been added the "second pillar" of a Common Foreign and Security Policy, and a "third pillar" on "Freedom, Security and Justice", not to mention the Economic and Monetary Union. The result, as all commentators agree, is an organization with an unparalleled degree of integration between its members. It can, without any doubt whatsoever, be described as an "economic union", and it would not be unreasonable to describe it as a "political union" also. Indeed, it has been expressly proclaimed that the Treaty on European Union [*sic*] marks "a new stage in the process of creating an *ever closer union* among the peoples of Europe".[19] That is not to say that the union between the members is total: but the TG does not just prohibit *total* union, political *and* economic, as we have seen. *Either* economic *or* political union is prohibited, and *partial* as well as total. Indeed, even activity "likely to promote, directly or indirectly" either kind of union is proscribed. Therefore, even if one were to concede, for the sake of argument, that membership in, say, the United Nations involves too loose an association to fall within the ban, the same can certainly not be said of the EU.[20]

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[19] Article A of the TEU, as amended by the Treaty of Amsterdam: italics added. So far as concerns the EEC, in *Opinion 1/91* the ECJ stressed how the "new legal order" of the EC distinguished it from other international organizations: *Draft Agreement on the European Economic Area*, [1991] ECR 6079, paragraph 21. The provisions of the EC treaty are only the means for attaining the objectives of the EC and "making concrete progress towards European unity": *ibid.*, paragraph 17. The adoption of the single European currency is likely to hasten this economic unity on all levels.

[20] The relatively small membership of the EU is also a factor which might be thought relevant here.

24. In an attempt to counter this rather obvious point, the Joint Opinion, in paragraphs 13-16, erects yet another "straw man" and adopts a highly artificial viewpoint. The "straw man" – which, to be fair, is mentioned only in passing - is that the EU is not a State. It is moving in that direction, but it is not yet a State. I have never suggested that it is a State, union with which is prohibited by the TG. But what I continue to maintain is that the European Union is just what its name says – a union of States with common law-making processes, common institutions, a common law, a common currency (for most of them), etc. To take a series of quotations out of context and to argue, as does the Joint Opinion, that it is "inaccurate to describe any individual member state as economically or politically in union with other individual member states" because "no member State 'forms part of the institutional order' of any other member State" is, with respect, to fly in the face of reality – even legal reality. Just because it is Union/Community law which applies and prevails in the law of each member, and not the law of each other, cannot disguise the fact that that law is proposed, enacted, supervised, and policed by *joint* institutions, that there is a *common* market, a *common* currency, a *common* foreign and security policy, and so on and so forth. To conclude otherwise would lead one to the absurd position, *mutatis mutandis*, that the United [*sic*] States of America are not in union with each other, because they retain their own legal systems, which can be overridden (to a limited extent) only by Federal law and the Federal courts. It would also presumably mean that if Cyprus and Greece were, whilst ostensibly retaining their sovereignty, to create a joint supranational legislature etc., in which, let us suppose, Greece had greater voting rights than Cyprus, there would not be a union so long as Greek law did not formally apply in Cyprus or vice versa. Similar considerations would apply to a personal union under the King of the Hellenes, even though that would plainly have been exactly the sort of thing that the Treaty sought to prohibit.

25. It therefore seems clear that, as I originally stated, for Cyprus to join the EU is to enter a union, economic and political, with the other member States. But there is more. For it has to be recalled, once again, that what the TG prohibits is not just economic or political union, but even *partial* union, and even "any activity likely to promote, directly or indirectly," such union. The Joint Opinion tries to skip over this difficulty by saying that "the prohibited result under *both* sentences of paragraph 2 is 'union with any other State or partition of the Island'". Not only does this beg the question that "any State whatsoever" in the TG means only a single State (a point which I have already shown to be highly questionable); it also clearly misrepresents what Article I(2) actually says, in two ways. First, it says that the two sentences are both concerned only with a result, whereas in fact the second sentence is expressly concerned with *conduct*, the conduct in question being "any activity likely to *promote, directly or indirectly*, ... union with any other State ...". Secondly, the prohibited result is not accurately stated in the Joint Opinion. It is not just "union with any other State or partition of the Island", but total *or* partial, political *or* economic, union. By mis-paraphrasing the language of the paragraph, the Joint Opinion seeks unsuccessfully to avoid the inescapable conclusion that EU membership would, at the very least, indirectly promote union with another State or States.

26. Nor is it relevant to argue that, notwithstanding its small size and population, Cyprus would not be dominated by any other, larger, State (especially Greece), if it were part of a European Union of 15 or 21 members.[21] Whatever may have been a main concern of the drafters, the language of the TG is not couched in terms of domination. If Cyprus were to unite with Malta, a smaller country, this would equally

[21] Joint Opinion, paragraph 16. It is nevertheless worth noting that the recently drafted Treaty of Nice extends qualified majority voting in the Council to 30 new areas which previously required unanimity. The influence of Cyprus in the Council would be minimal (weighted votes of 4, compared to Greece's 12 and the UK's 29), so it would have little control over its own destiny in many areas of decision-making.

be prohibited by the language of the Treaty even if it were Cyprus that was the dominant partner. It is union which is prohibited, partial or total, as well as steps directly or indirectly tending in that direction. It can hardly be disputed that, in general terms, the members of the EU are closer to each other than to outside States; and it is scarcely conceivable that, if Cyprus and Greece were fellow-members of the EU, they would not be brought even more closely together, tied as they are (so far a concerns the majority population of each country) by common ties of religion, language, history, and so on.

27. Despite the denial in the Joint Opinion,[22] the Judgment of the Permanent Court of International Justice in the *Austro-German Customs Régime case*: (1931) Ser. A/B 41, is of some interest in the present matter, even if the facts are not identical. Under Article 88 of the Treaty of Saint-Germain 1919, Austria had undertaken not to alienate its independence without the consent of the Council of the League of Nations and consequently to "abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly ... by participation in the affairs of another Power". A 1922 Protocol had elaborated on this by making it clear that economic independence was included, and that Austria was not to "violate her economic independence by granting to any State a special regime or exclusive advantages *calculated to threaten this independence*" (emphasis added). Austria entered into an agreement with Germany in 1931 to conclude a treaty establishing a customs union, notably by the abolition of tariffs between themselves and the operation of a common external tariff. The threshold for the commission of a prohibited act was rather higher under those treaties than in the present case – loss of independence rather than political or economic union – and the customs union

envisaged would have been much more modest than the Common Market or EU. Nevertheless, the International Court held that Austria would be violating its treaty obligations by entering into the proposed arrangements. Judge Anzilotti, one of the eight Judges in the majority, expressly held in his separate opinion that even the rather less specific obligations under Article 88 of the Treaty of Saint-Germain (which did not expressly refer to economic independence or specific duties in connection with it) would be violated by such an arrangement. And although it is true that, as the Joint Opinion observes, Judge Anzilotti's separate opinion turned on the disparity in economic strength between Austria and Germany, this is not part of the holding of the other members of the majority. The drafters of the TG would certainly have been aware of this precedent.[23]

28. In the light of the foregoing analysis, it is submitted that a clear conclusion emerges which cannot be rebutted by a single and weak instance of the subsequent practice of the parties referred to in paragraph 17 of the Joint Opinion. The point made there is that, because neither Turkey nor the UK invoked the TG as a reason why Cyprus should not enter into the 1972 Association Agreement with the EEC, full EU membership would not violate the TG either. (Turkey did in fact object to the Agreement, but on different grounds.) However, it would be a mistake to read too much into this omission. The Association Agreement, which was one of the first, was a relatively modest affair, amounting to very little more than a preferential trade agreement. Such agreements did not by any means invariably lead to full membership

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[22] Paragraph 16.

[23] It is also of some interest to note that, although it was loss of independence to Germany alone that the drafters of Article 88 had in mind, and although that Article did not contain any express reference to alienation of independence to a *group* of States, the Court expressly said that this would be caught too: *ibid.*, p. 46.

of the EEC, and there could have been all sorts of reasons why Turkey might have chosen not to protest (not to mention the UK, which was itself about to enter the Community). The *SS "Lotus" case*[24] teaches us that, because omissions can be ambiguous, it is unsafe, in the absence of other evidence, to assume from an omission that the State concerned thinks or accepts that it is legally obliged to refrain from acting or protesting.[25]

29. In paragraphs 21-23, the Joint Opinion cites the positive attitude of the EU and (to a lesser extent) the Security Council towards the application. However, the thrust of the opinion of the European Commission of 1993 – which I referred to in the factual account in my Opinion[26] - was that, since it was EC policy not to recognize the TRNC, it had to reject the Turkish Cypriot claim that the regime in the south did not represent the whole of Cyprus and that the application was consequently inadmissible. However, as was clear from my original Opinion and as is explained in paragraph 5 above, the TRNC's arguments about representation and sovereignty are not the basis of my argument here.[27] The Commission's Opinion did not seriously address arguments based on the TG or the Constitution, presumably because to do so would have been inconsistent with the general policy just mentioned.

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[24] (1927), PCIJ Ser. A/10, p. 23.

[25] *A fortiori* if it has protested, but on a different ground. It is also significant that the omission here would not be sufficient to found an estoppel.

[26] Paragraph 72.

[27] The Joint Opinion is somewhat economical with the truth when it says that "The Commission went on to deal with economic and other issues relating to possible accession, reaching a broadly favourable conclusion." In fact, the Commission's opinion, with which the member States concurred, that admission negotiations should be *deferred* until the problems between the two communities were resolved. (It is, however, true that the EU has since reversed that position, for political reasons.)

30. Contrary to the position taken in paragraph 22 of the Joint Opinion, Article 234 (now 307) of the EC Treaty is not really relevant to the discussion. Its function is to safeguard the pre-existing international obligations of *Members* towards non-Members. Cyprus is not a Member. Admittedly, the UK and Greece are. But such safeguarding would normally take place at the instance of the Member State who would otherwise be put in a conflicting position,[28] and if neither the UK nor Greece wished to raise the issue, the Commission would be unlikely to do so.[29] And, above all, there is nothing in the Vienna Convention provisions on interpretation of treaties (or in customary international law) which says that the subsequent conduct of *non-parties* to a treaty (in this case, the EU) is relevant to its interpretation. Indeed, the International Law Commission's commentary on articles 27 of its final Draft Articles on the Law of Treaties, which provided the basis for Articles 31 of the Vienna Convention, made it clear that, when paragraph 3(b) requires account to be taken of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", "the parties" means *all* the parties to the treaty.[30] Turkey does not agree with the interpretation of the other parties to the TG, and so, according to the Vienna Convention, the agreement of those other parties as to the interpretation is not something required to be taken into account. *A fortiori* the practice of non-parties, such as the EU.

31. Similar considerations, *mutatis mutandis*, apply to the Security Council's decision to welcome the opening of accession negotiations by the EU with the Greek

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[28] Or a private party wishing to rely on the prior agreement in litigation, which was not the case here.
[29] Consequently, the Joint Opinion's reference (in footnote 38) to Article 30(4) of the Vienna Convention (dealing with overlapping treaties) is beside the point.
[30] Report of the ILC on the 2nd part of its 17th Session and on its 18th Session, UN, General Assembly Official Records, 21st Sess., Supplement No. 9 (A/6309/Rev.1), pp. 52-53, paragraph 15.

Cypriot authorities, and them alone.[31] Nor should it be forgotten that the Security Council is essentially a political body, and that the same is true of the EU when deciding whether to accept new members.

32. Paragraphs 24-27 of the Joint Opinion argue that Austria's admission to the EU is an analogous case to the present one. I had already dealt with this proposition in my supplementary Note of 21 July 1997 (Annex II to the present Opinion), and there is very little I need to add. The main point I made, and which the Joint Opinion is unable to controvert, is that – unlike the present situation – none of the parties to the Austrian State Treaty of 1955 in the end objected to Austria's strong wish to join the EEC. In particular, the Soviet Union, which had originally expressed misgivings, decided not to object.[32] If the parties to a treaty all waive, or acquiesce in, a possible breach, that is the end of the matter. There is a crucial difference here, since Turkey clearly does object to Cyprus joining the EU, and has repeatedly done so at every stage.

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[31] Paragraph 23 of the Joint Opinion.

[32] It may be true that the Soviet Union's main concern was the possible abandonment of Austria's permanent neutrality – a matter not dealt with in the State Treaty itself. But the passage I quoted from 35 *Keesing's Record of World Events* (1989), p. 36431 also notes that originally Soviet President Gorbachev and Prime Minister Ryzhkov asserted that "integration processes in Europe and the implications of a single market needed 'serious study' and that combining economic internationalization with political independence was a 'great problem'". This seems to be a reference to Article 4 of the State Treaty. But in view of the subsequent Soviet waiver of any rights it might have had, it is unnecessary to investigate this matter further.

For the same reason, it is unnecessary to explore the differences between the two Treaties or the legal basis of the (unsurprising) position taken by Austria and its political and academic supporters that membership of the EC was compatible with its obligations under the State Treaty.

33. This brings me to another point made in the Joint Opinion.[33] It is there said that "if Article I paragraph 2 [of the TG] is interpreted as prohibiting Cyprus from becoming a member of the EU, that prohibition is permanent and unconditional. It has nothing to do with the question whether or when Turkey may become a member of the EU." In a literal sense, it is true that the prohibition is unconditional, and that the mere admission of Turkey to the EU would not automatically remove the legal barrier to the membership of Cyprus. But the answer to this point – so far as it needs an answer – is the same as that made in the previous paragraph - waiver. I have no information on whether Turkey intends abandoning its objections to the membership of Cyprus if it were itself admitted to the Union, though many have speculated that it would. What is certainly clear is that, if it did waive its objections, the ban in the Treaty of Guarantee would not be "permanent".[34]

34. For all of the above reasons, I find nothing in the Joint Opinion which causes me to revise my view about the interpretation of the Treaty of Guarantee. Specifically, for Cyprus to join (or even apply to join) the EU would be a breach of Article I; and in accordance with Article II Greece and the United Kingdom are under an obligation to guarantee the independence of Cyprus as defined in Article I and to prohibit "so far as concerns them" an activity aimed at promoting, directly or indirectly, the forbidden union. It is very arguable that this requires them to refrain from any encouragement

[33] Paragraph 7.

[34] It being clear that both Greece and the UK do not object.
It might also be argued that, by stating in 1959 that there would be no objection to Cyprus joining an organization of which both Greece and Turkey were members, Turkey would be precluded from objecting to Cyprus's membership once it was itself a member. However, this might depend on circumstances at the time, and in particular on who was claiming to represent Cyprus and with what authority; accordingly it is not appropriate to go further into the question here.

of the application; but in any case, it would certainly be in their power to prevent this action by the simple expedient of a veto in the EU.

THE CONSTITUTION OF CYPRUS: SOME FURTHER POINTS

35. I now turn to two other issues raised in the Joint Opinion: Article 50 of the Cyprus Constitution, and "most-favoured-nation" treatment.

36. I discussed Article 50 in (especially) paragraphs 14, 34, 38, 47, 48 and 109 of my Original Opinion, as well as in paragraphs 15-20 of the present Opinion. It will be recalled that this provision gave a veto both to the (Greek Cypriot) President and the (Turkish Cypriot) Vice-President over foreign affairs, including membership of international organizations (unless both Greece and Turkey were members). The thrust of paragraphs 28-34 of the Joint Opinion is that, since there has not been an election for a Vice-President since 1959 and the last incumbent is now dead, this provision cannot be given effect, but this cannot prevent Cyprus from engaging in international affairs, including joining international organizations.

37. A number of questions could be raised about this assertion, involving issues both of fact and of law. For instance, would it make no difference if the absence of a Vice-President were wholly or mainly the fault of the Greek Cypriot majority? Does the doctrine of necessity have a valid place (a much contested question) in the constitutional law of common-law countries? But more fundamentally, the Joint Opinion ignores two important points. The first is that, quite apart from any consequences in Cypriot constitutional law, Article 50 throws light on the meaning of the prohibitions in the Treaty of Guarantee of acts which might directly or indirectly

lead, wholly or partly, to economic or political union with any State. As I have already suggested (above, paragraph 19 in particular), granting a veto to the representatives of each community over membership of international organizations, and then excepting from this veto those organizations of which both Greece and Turkey were already members, shows that membership of international organizations *was* thought to have the potential (without these safeguards) of jeopardising political or economic independence, etc. The fact that the veto over membership of international organizations (and the exception to it) was discussed at the drafting stage in the context of Article I(2) of the TG bears this out. Nor is this a purely accidental coincidence of two separate instruments – the Constitution and the TG. For the former is no ordinary constitution, but – very unusually - one *guaranteed* by an international agreement: the Treaty of Guarantee. In Article I(1) of the TG the Republic of Cyprus undertook, *inter alia*, to ensure "respect for its Constitution", whilst the three other States, in Article II, "recognise[d] and guarantee[d]", *inter alia*, "the state of affairs established by the Basic Articles of its Constitution".

38. The second important point largely ignored by the Joint Opinion is as follows. It will be recalled (see above, paragraph 17) that Article 50 was one of the "Basic Articles" of the Constitution which was expressly made unamendable. The Greek Cypriot authorities have, indeed, not purported actually to amend the Constitution – though they have declared some parts of it "inoperative". But even if they did purport to amend it, it is plainly the *original* Constitution which Cyprus is under an *international* obligation to respect, and the "state of affairs established by the [*originc*l] Basic Articles" – which includes, as a major feature, power-sharing - which is guaranteed by the other three powers (see Art. II(1) of the TG). This is made

abundantly clear by the language, by the drafting history (which has already been recounted in my original Opinion in particular), and by the preamble to the TG itself. The latter declares that the four States,

> a. Considering that the recognition of maintenance of the independence, territorial integrity and security of the Republic of Cyprus, as established and regulated by the Basic Articles of its Constitution, are in their common interest,
>
> b. Desiring to co-operate to ensure respect for the state of affairs created by that Constitution,
>
> Have agreed as follows:

Thus, whereas most countries can - as a matter of *international* law - change their constitution as they please, whether or not they conform to existing domestic law,[35] this particular basic law is different. Cyprus has agreed by treaty to ensure respect for its Constitution, and the other three States recognize and guarantee the state of affairs established by its Basic Articles. This is not merely a duty on the Guarantors, however; jointly and severally, they also have an international legal interest in compliance by Cyprus. This is not the normal situation. Therefore, by largely concentrating on what is the standard case, the Joint Opinion fails to do justice to the particularities of the present one.

39. In a part of paragraph 109 of my original Opinion, I made a subsidiary point about the provision concerning most-favoured-nation treatment in Article 170(1) of the Constitution. Paragraphs 35-37 of the Joint Opinion are devoted to this issue. They attack points I did not make and, to some extent at least, misunderstand the one I did make. Article 170(1) provides that "The Republic shall, by agreement on appropriate

terms, accord most-favoured-nation treatment to the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland for all agreements whatever their nature might be." This is one of the unamendable Basic Articles of the Constitution: see Article 182 and Annex III. It also finds expression, in virtually identical terms, in Part II of Annex F of the Treaty of Establishment between the four state parties. I did *not* say that this conferred a vested right on Turkey (or the other two guarantors); I agree that the language ("by agreement" and "on appropriate terms") makes it clear that this a *pactum de contrahendo*. Consequently, I did not argue that the entry of Cyprus into the EU without Turkey would violate some existing right of Turkey to MFN treatment. Rather, I made two points which do not seem to me to have been adequately addressed in the Joint Opinion.

40. First, Article 170(1) reproduces practically verbatim Art. 23(1) of the 1959 agreed Basic Structure. I pointed out that, at the London meeting of 12 February 1959 of the three Foreign Ministers,[36] the question of its meaning was discussed. In reply to a question from Lord Perth, the Foreign Ministers of Turkey and Greece indicated that "The intention was to exclude more favourable bilateral agreements between Cyprus and countries other than the Three Powers, and *also to avoid the possibility of either Greece or Turkey securing a more favourable position in Cyprus than the other - of Greece, for example, establishing a kind of economic enosis"* (emphasis added). The Joint Opinion[37] asserts that the emphasis is on *bilateral* agreements, whether with Greece or third States. But the actual language of Article 170(1) and of its

[35] Leaving to one side as irrelevant limitations that may be imposed by international law on the grounds of human rights, self-determination, etc.
[36] Above, paragraph 18.
[37] Footnote 60.

predecessor, the Basic Structure, is not restricted to bilateral agreements and is couched in the most sweeping terms: "for all agreements whatever their nature might be". The purpose is (a) to ensure that the three Guarantors do not receive less favourable treatment than any other State; *and, at least as importantly,* (b) to avoid a situation where Cyprus, by according special economic advantages to Greece – or, it should be pointed out, Turkey – could bring about or move towards the economic union (total or partial, direct or indirect) which the parties were so keen to prevent. What the Joint Opinion does not – and cannot – deny is that the entry of Cyprus into the Common Market without Turkey would enable, and indeed generally require, it to treat Greece more favourably than it treats Turkey, and vice-versa. This is likely to encourage ("directly or indirectly") the kind of economic union (total or partial) which the TG was so anxious to block, and thus to be contrary one of the most important objectives of the TG. Secondly, even leaving aside the question of steps tending towards the prohibited union, it is quite clear that, if Cyprus joined the EU without Turkey, the latter could not enjoy a most-favoured-nation in relation to it. This point, too, is not denied by the authors of the Joint Opinion – indeed, they make it themselves, though for a different purpose. It may be true that, because of the operation of the "customs union" exception in the General Agreement on Tariffs and Trade and other instruments, unequal treatment could quite possibly have occurred even if the envisaged MFN agreement had been concluded. But that is to speculate on the terms of such an agreement.[38]

[38] Neither would it answer my point to remark that, because Turkey is part of the EU's extended customs union, Cypriot membership in the EU would actually decrease the disparity between the way that Turkish goods are currently dealt with and the treatment of Greek or British goods. Article 170(1) aims at *most*-favoured-nation treatment, not merely *improved* treatment.

41. In paragraph 37, the Joint Opinion also observes "in passing" that "It should be noted ... that Article 1 of the 1963 Trade Agreement between Cyprus and Turkey expressly envisages that Cyprus will or may enter an economic community such as the EEC. This contradicts the argument now made that Article I paragraph 2 of the Treaty of Guarantee permanently prevents such entry". However, the provision referred to in the Joint Opinion reads as follows:

> The above most-favoured-nation treatment shall not apply:
> ...
> (c) to privileges, exemptions from taxes (fees), preferences or concessions which each of the Contracting countries has granted or will grant in the future to other countries on account of a present or future participation, entry or association by them to a customs union, a free trade area or an economic community.

It will be noted that the wording is quite general and even hypothetical, and certainly does not amount to a waiver of Turkey's right to object to entry into the EU by virtue of the TG. It is not even addressing that issue, but simply the MFN consequences should Cyprus *lawfully* join or be associated with one of these types of economic grouping.[39] This paragraph of the Joint Opinion is also another example of the way in which its authors put words into my mouth ("the argument now made") that I did not utter. I did not say that Article I(2) of the TG *permanently* prohibits entry into the EU, for I have repeatedly observed, in the Original Opinion as well as in the present one, that if all the parties to the TG agree to entry, there is no impediment.[40]

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[39] And, of course, in 1963 the breakdown in relations between Ankara and Nicosia had not yet occurred.

[40] See also paragraph 33 above.

42. In paragraphs 112-19 of my Opinion, I pointed out the practical difficulty of applying EU law throughout Cyprus when, as the Commission and the European Court of Justice candidly recognised, the Greek Cypriot authorities are not able to exercise effective authority over the part of the island controlled by the TRNC. This would be an impediment to the carrying out in full of the obligations contracted in the name of the Republic of Cyprus towards the other Members, and their obligations to it. This point is not addressed in the Joint Opinion. Possibly, this fact does not represent a technical obstacle to the application's being *considered*, but it is an unprecedented and major practical problem if admission takes place. The EU has decided to ignore it in order to put pressure on the opposing Cypriot communities to come to a settlement; but unless such a settlement is indeed reached, the serious practical problems will remain.

43. In paragraphs 78-94 of my original Opinion, I considered whether the Treaties in question, and particularly the TG, were valid and, if so, whether they had been terminated. I came to the conclusion that there was no difficulty in this regard, not least because the parties seemed to be in agreement that they were still in force. This is not disputed in the Joint Opinion,[41] but there is one statement made there which I should mention. At paragraph 38 it says:

> It has not been necessary in this opinion to deal with any questions that would arise if Article I of the Treaty of Guarantee, or Articles 50 or 170 of the Constitution, were to be interpreted so as to preclude Cyprus from acceding to the EU. Even on that assumption, it would be very doubtful whether Turkey could raise any objection, because of its own breaches of the Treaty of Guarantee. But in our opinion the meaning of the three provisions is clear.

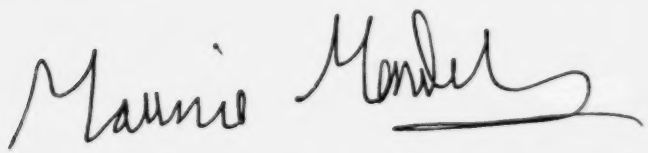
[41] See also paragraph 6 above.

> Thus questions of estoppel, or of the application of the principle that a party in breach of a treaty provision may not itself rely on it, simply do not arise.

The authors of the Joint Opinion do not give any reasons for their assertion that Turkey's alleged breaches preclude it from relying on the TG. If they had attempted to do so, they would have had to grapple with numerous questions of fact and law, including the following. What exactly were the facts behind the breakdown of inter-communal relations in the 1960s, who was to blame, and what were the legal consequences? Does the doctrine of necessity or some other doctrine legitimize a failure to comply with entrenched, unamendable constitutional provisions? What exactly happened following the 1974 *coup d'état* by supporters of the Greek junta, who was responsible for it and what legal effects did it have? Did it justify intervention by Turkey? Was the right of intervention in Article IV rendered invalid by some pre-existing or subsequently emerging rule of *ius cogens* or by Article 103 of the UN Charter? If intervention was lawful, did it entitle Turkey to remain in Cyprus and, if so, in what circumstances? What was the legal effect of the establishment of the TRNC? What is the meaning and effect of the various Security Council resolutions on the subject? And so on. Such questions were far beyond the scope of my original Opinion and, especially when the Joint Opinion's authors have provided no detailed reasons but simply an unsupported assertion, it does not seem necessary to go into them here. The more so when, both under the Vienna Convention on the Law of Treaties and customary international law, it is for the party claiming suspension or the right to refuse to perform a treaty to raise and make good its claim to be relieved from what would otherwise be the legal consequences of having undertaken a treaty commitment.

CONCLUSION

44. For these reasons, then, I maintain my original view. Specifically, I am accordingly of the opinion (1) that to apply to join, or to join, the EU would be a breach of Cyprus' international legal obligations, and in particular of Article I of the Treaty of Guarantee, as well as of its internationally guaranteed Constitution; (2) that for any of the Guarantors to assist that application would be a breach of their international legal obligations towards each other and towards the inhabitants of Cyprus as a whole; (3) that Greece and the UK are in fact under an obligation, under Article II of the Treaty of Guarantee in particular, to use the legal power that they have, and in particular the veto over accession, in order to impede such attempts; and (4) that, if Cyprus were to be admitted to the EU without the political problems having been resolved, the practical effect is likely to be that the entity admitted will be unable to fulfil all of its obligations towards the other members, and probably that the other members will be unable fully to carry out their obligations towards the whole of Cyprus and its inhabitants.



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12 September 2001

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ANNEX I

OPINION OF PROFESSOR M. H. MENDELSON Q.C. ON THE APPLICATION OF THE REPUBLIC OF CYPRUS TO JOIN THE EUROPEAN UNION

1. I have been asked for my opinion in relation to the application by the Greek Cypriot authorities in Cyprus to join the European Union.

2. In summary, my opinion is that, on a proper construction of the relevant treaties and related instruments, the Greek Cypriot Administration is not entitled in international law to apply to join or, having applied, to join, the European Union whilst Turkey is not a member. Furthermore, as members of the EU and parties to the agreements in question, Greece and the United Kingdom are under an obligation to seek to prevent such accession. Moreover, as a matter of the law of the European Community, there are serious legal obstacles to such accession.

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THE FACTS

3. For reasons which will become apparent, it is desirable to set out the facts at some length.

4. On 5 February 1959, negotiations commenced in Zurich between the Greek and Turkish Governments regarding a solution to the Cyprus question.[1] It seems that there

[1] Kyriakides, in Blaustein & Flanz, Constitutions of the Countries of the World: *s.v.*, Cyprus (1972), 7.

was consultation with the leaders of the Greek and Turkish Cypriot communities,[2] although this does not appear on the face of the documents which I have seen. Agreement was reached on 11 February 1959 on the establishment of an independent state. Prime Ministers Karamanlis and Menderes initialled a draft Basic Structure of the Republic of Cyprus; a draft Treaty of Guarantee between the Republic of Cyprus of the one part, and Turkey, Greece and the UK on the other; and a draft Treaty of Alliance between Cyprus, Turkey and Greece. These documents were drawn up in French and became known as the Zurich Agreement. The Zurich Agreement represented a compromise between the Greek Cypriot community which was pushing for union or "*enosis*" with Greece and the Turkish Cypriot community which was pressing for partition of the island ("*taksim*")[3].

5. Also on 11 February 1959, the Greek and Turkish Foreign Ministers, Messrs Averoff and Zorlu, flew to London to consult the United Kingdom Secretary of State for Foreign Affairs. It was agreed in those consultations that certain areas of Cyprus would remain under the sovereignty of the United Kingdom. I have consulted the minutes of the meeting held at the Foreign Office on 12 February 1959 attended by the Foreign Ministers of the United Kingdom, Turkey and Greece. According to these minutes, the United Kingdom Foreign Secretary stated that, if agreement could be reached between the Three Powers, then the Greek and Turkish Cypriot delegations could be invited to London for a conference. M. Averoff advised that his Prime Minister had explained the

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[2] Necatigil, The Cyprus question and the Turkish position in international law, (2nd ed., 1996), p. 9. Although this author, as a high official in the Turkish Cypriot administration, may be thought to be *parti pris*, his account of the facts which I have cited here appears to be accurate. So far as the legal analysis is concerned, most of the authors whose writings I have examined are anxious to advance a particular point of view: for my part, I have attempted to reach my own independent conclusions.

[3] Redmond, The Next Mediterranean Enlargement of the European Community: Turkey, Cyprus & Malta? (1993), p. 74.

Zurich Agreement to Archbishop Makarios, whose response had been favourable and who would be seeing the actual documents that evening; the Greek Cypriot community would agree to anything the Archbishop himself agreed to.

6. The Foreign Secretary then asked a number of questions about the Zurich Agreement documents. The first concerned the second paragraph of Article 1 of the Treaty of Guarantee. Article 1 reads as follows:

> The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution.
>
> It undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. With this intent it prohibits all activity tending to promote directly or indirectly either union or partition of the Island." [4]

7. The question was whether the second paragraph was intended to preclude Cypriot membership of all international associations, for example the [European] Free Trade Area (if it ever came into existence). M. Zorlu, explained that the paragraph was "intended to prohibit partition and Enosis (either with Greece or any other country)". M. Averoff agreed - "the wording was specifically designed to exclude possible Greek devices in the direction of Enosis, such as a personal union of Cyprus and Greece under the Greek Crown." "M. Zorlu and M. Averoff both made it clear that there would be no objection to Cypriot membership of international associations of which *both* Greece and Turkey were members e.g. the [Universal] Postal Union, and any Free Trade Area.

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[4] Conference on Cyprus, Cmnd. 679. As previously indicated, the authentic text of the Zurich Agreement is in French; but there is no material difference between this and the official English translation, though in some cases to which I refer below the French text helps to clarify the English. As will also be noted below, the formal Treaty of Guarantee was actually executed in English as well as French.

8. A question also arose in connection with paragraph 23 of the Basic Structure. This provided:

> The Republic of Cyprus shall accord most-favoured-nation treatment to Great Britain, Greece and Turkey for all agreements whatever their nature.
>
> This provision shall not apply to the Treaties between the Republic of Cyprus and the United Kingdom concerning the bases and military facilities accorded to the United Kingdom.

Lord Perth observed that, as drafted, this might do economic harm to Cyprus. To this, the Foreign Ministers of Turkey and Greece replied that the maintenance of Commonwealth preference would not be excluded: "The intention was to exclude more favourable bilateral agreements between Cyprus and countries other than the Three Powers, and *also to avoid the possibility of either Greece or Turkey securing a more favourable economic position in Cyprus than the other - of Greece, for example, establishing a kind of economic enosis*" (my italics).

9. On 17 February 1959, the United Kingdom Government declared that it had examined the Zurich Agreement and that "taking into account the consultations in London from February 11 to 16, 1959, between the Foreign Ministers of Greece, Turkey and the United Kingdom", it accepted those documents as the agreed foundation for the final settlement of the problem of Cyprus, subject to, in particular, the retention by the UK of two sovereign base areas, and provision being made by agreement for the "protection of the fundamental human rights of the various communities in Cyprus".[5]

10. On 17 and 19 February 1959, a Memorandum was signed at Lancaster House in London by the Prime Ministers of the United Kingdom, Turkey and Greece.[6] In it, they (1) noted the declarations by the representatives of the Greek Cypriot and Turkish

[5] 164 British & Foreign State Papers (1959-60), 1.
[6] Conference on Cyprus, Cmnd. 679.

Cypriot communities accepting the documents annexed to the Memorandum as the "agreed foundation for the final settlement of the problem of Cyprus" and (2) adopted these documents accordingly as the agreed foundation. It should be noted that, in accordance with this, all of the documents discussed below were signed or initialled, not only by representatives of the Three Powers, but also by those of the Greek Cypriot and Turkish Cypriot communities, respectively.

11. The documents annexed to the memorandum are listed as:

A - Basic Structure of the Republic of Cyprus;

B - Treaty of Guarantee between the Republic of Cyprus and Greece, the United Kingdom and Turkey;

C - Treaty of Alliance between the Republic of Cyprus, Greece and Turkey;

-these three being the main Zurich Agreement documents -

D - Declaration made by the Government of the United Kingdom on February 17, 1959 (described above, para.9);

E - Additional Article to be inserted in the Treaty of Guarantee;

F - Declaration made by the Greek and Turkish Foreign Ministers on February 17, 1959;

G - Declaration made by the Representative of the Greek-Cypriot Community on February 19, 1959;

H - Declaration made by the Representative of the Turkish-Cypriot Community on February 19, 1959;

I - Agreed Measures to prepare for the new arrangements in Cyprus.

12. All of these documents were signed or initialled, as the case may be, by representatives of the UK, Turkey and Greece, as well as by the representatives of the two communities, save for the Agreed Measures, which was initialled only by the

representatives of the three Guarantor States. I analyse these documents more fully immediately below.[7]

A - Basic Structure of the Republic of Cyprus

13. This document provides the framework for the future constitution of the future Republic of Cyprus ("RC"). Article 1 provides that the President shall be Greek and the Vice-President shall be Turkish, elected by their respective communities by universal suffrage.

14. Article 8 provides that "The President and the Vice-President, separately and conjointly, shall have the right of final veto on any law or decision concerning foreign affairs, except the participation of the Republic of Cyprus in international organisations and pacts of alliance in which Greece and Turkey both participate, or concerning defence and security as defined in Annex I." The grammatical structure of this provision is somewhat peculiar, and some clarification can be obtained by comparing it with the French text of the draft Basic Structure in the Zurich Agreement: "Le Président et le Vice-Président auront séparément et conjointement le droit de veto définitif sur toute loi ou décision se référant aux affaires étrangères sauf la participation de la République de Chypre à des organisations internationales et pactes d'alliance dont la Grèce et la Turquie font toutes deux parties, à la défense et à la sécurité telles que définies dans l'annexe I." This confirms that the Vice-President (as well as the President) is to have a power of veto over all questions of foreign affairs except the participation of Cyprus in international organizations in which *both* Turkey and Greece are members. In other words, he retains his veto over membership of organizations of which only *one* of the two States is a member - which, of course, includes the European Union.

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[7] On the same day, the Colonial Secretary (Mr. Alan Lennox-Boyd) confirmed (amongst other things) that the Turkish community should have an equal right with the Greek community to determine its future status: Parliamentary Debates, House of Commons (1956-7), vol. 562, col. 1268. On 26 June 1958, the Prime Minister (Harold Macmillan) described the Colonial Secretary's statement as a "pledge"; *Ibid.*, vol. 590, col. 729.

15. Article 21 provides:

A Treaty guaranteeing the independence, territorial integrity of the constitution of the new State of Cyprus shall be concluded between the Republic of Cyprus, Greece, the United Kingdom and Turkey. A Treaty of military alliance shall also be concluded between the Republic of Cyprus, Greece and Turkey.

These two instruments shall have constitutional force. (This last paragraph shall be inserted in the Constitution as a basic article.)

16. Article 22 provides as follows: "It shall be recognised that the total or partial union of Cyprus with any other State, or a separatist independence for Cyprus (i.e. the partition of Cyprus into two independent states), shall be excluded."

17. Article 23 provides that:

The Republic of Cyprus shall accord most-favoured nation treatment to Great Britain, Greece and Turkey for all agreements whatever their nature.

This provision shall not apply to the Treaties between the Republic of Cyprus and the United Kingdom concerning the bases and military facilities accorded to the United Kingdom.

18. Article 27 provides that all of the Articles in the Basic Structure "shall be basic articles of the Constitution of Cyprus".

B - Treaty of Guarantee

19. The second document whose terms were agreed at the 1959 London Conference was the Treaty of Guarantee between the Republic of Cyprus of the one part, and Greece, the United Kingdom and Turkey of the other. It should be noted, however, that the actual treaty itself was signed at Nicosia and came into force only on 16 August

1960, the date of independence.[8] The treaty was drawn up in English and French, both texts being equally authoritative. In some respects, the French casts further light on the English, and in these cases I will quote both.

20. In Article I,

The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution.

It undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited[9] all activity likely[10] to promote, directly or indirectly, either union with any other State[11] or partition of the Island. (Elle assume l'obligation de ne participer intégralement ou partiellement à aucune union politique ou économique avec quelque Etat que ce soit. Dans ce sens elle déclare interdite toute activité de nature à favoriser directement ou indirectement aussi bien l'union avec tout autre Etat que le partage de l'Ile.)

21. In Article II,

Greece, Turkey and the United Kingdom, taking note of the undertakings of the Republic of Cyprus set out in Article I of the present Treaty, recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution.[12]

Greece, Turkey and the United Kingdom likewise undertake to prohibit, so far as concerns them[13], any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other State or partition of the Island.

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[8] UK Treaty Series No. 5 (1961), Cmnd. 1253.

[9] The London Conference text said "With this intent it prohibits" - but nothing appears to turn on this change of wording.

[10] The London Conference text said "tending".

[11] The London Conference text omits the words "with any other State".

[12] The London Conference text had, in place of the words following the final comma, "as well as respect for its Constitution". The change is no doubt due to the fact that, in 1959, the Constitution had yet to be drafted.

[13] The original London Conference text used the phrase "as far as lies within their power" here.

22. Article III, which was not included in the original Zurich version of the Treaty of Guarantee but was included in the version finally adopted in 1960, contains an undertaking by the RC, Greece and Turkey to respect the British sovereign base areas and a guarantee by them of the use and enjoyment by the United Kingdom of the rights secured by the Treaty of Establishment concluded on the same date between the UK on the one hand, and the RC, Greece and Turkey on the other.[14]

23. Article IV of the Treaty of Guarantee provides:

> In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.
>
> In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.[15]

C - Treaty of Alliance

24. This agreement, between the RC, Turkey and Greece, seems of small relevance to the present question. It may, however, be noted that, in Article 2, the Parties "undertake to resist any attack or aggression, direct or indirect, directed against the independence and territorial integrity of the Republic of Cyprus".

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[14] See below, paragraph 33 for the Treaty of Establishment.

[15] Again, there are small variations between this text and the one agreed at Zurich, but they do not seem material.

D - Declaration by the UK Government

25. This concerns in particular the retention of the British sovereign base areas and certain other matters, and has already been outlined in paragraph 9 above.

E - Additional Article to be inserted in the Treaty of Guarantee

26. This concerns the retention by the UK of its two sovereign base areas and has already been discussed in connection with the Treaty of Guarantee.

F - Declaration made by the Greek and Turkish Foreign Ministers

27. This accepts the Declaration made by the United Kingdom Government (D above), and also the Zurich Agreement, which together provide "the agreed foundation for the final settlement of the problem of Cyprus".

G - Declaration made by the Representative of the Greek-Cypriot community

28. By this, Archbishop Makarios declares that he has examined the Zurich Agreement and the Declarations of 17 February 1959 made by the Three Powers, and accepts these documents as the agreed foundation for the final settlement of the problem of Cyprus. This document was initialled by the representatives of the Three Powers and by Dr Kutchuk on behalf of the Turkish Cypriot community.

H - Declaration made by the Representative of the Turkish-Cypriot community

29. *Mutatis mutandis*, this is identical to G above.

I - Agreed measures to prepare for the new arrangements in Cyprus

30. These comprised certain transitional measures, as well as the establishment of a Joint Commission in Cyprus to complete a draft Constitution, incorporating the Basic Structure agreed at the Zurich Conference and "scrupulously observ[ing]" the Zurich Agreements generally. (This Commission was to be made up of one representative from each of the two Cypriot communities, plus one representative each from Greece and Turkey.)

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31. In July 1960, the relevant United Kingdom Ministers reported to Parliament on the progress of the measures to implement the conclusions of the London Conference. [16] They stated that the Joint Commission had completed its work on 6 April 1960, when the draft Constitution was signed in Nicosia; although the Government was not represented on the Commission, it had seen the draft and had no comments to make on it. They noted that the Government was a guarantor of the Basic Articles of the Constitution, the draft of which was attached. They added that elections had been held in December 1959 and that Archbishop Makarios and Dr Kutchuk had been returned as President and Vice-President elect of the Republic. They further reported that a Joint Committee, following what appear to have been quite extensive negotiations in London and Cyprus, had reached agreement on the drafting of the relevant treaties on 1 July 1960. The agreed draft Treaties are annexed to the report.

32. The United Kingdom Parliament then passed the Cyprus Act, enabling independence to be granted to the Republic. Pursuant to the Act, the Republic of

[16] Cmnd. 1093.

Cyprus Order in Council, 1960 came into operation on 10 August 1960.[17] This provided that the constitution set out in the documents in the Greek and Turkish languages, which were initialled at Ankara on 28 July 1960 by representatives from all five parties as the Greek and Turkish texts of the Constitution of the Republic of Cyprus, should come into force on 16 August 1960.

33. On 16 August 1960 in Nicosia, the Treaties of Guarantee, of Alliance and of Establishment were signed by the parties, and independence was declared. The first two Treaties have already been discussed. The Treaty of Establishment[18] was drawn up between the RC of the one part, and the Three Powers of the other, in implementation of the UK Declaration made at the London Conference and the consequential Declarations made by the representatives of the other four parties (D, F, G & H above). It mainly concerns the British sovereign base areas, state succession, and the like.[19]

The Constitution[20]

34. The Constitution which was drawn up reflects and expands on the Zurich and London Agreements, especially the Basic Structure. Article 1, in providing for a Greek Cypriot President and a Turkish Cypriot Vice-President, mirrors the corresponding

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[17] Statutory Instrument No. 1368 of 1960.
[18] UK Treaty Series No. 4 of 1961, Cmnd. 1252.
[19] It should, however, perhaps be noted that, with regard to the requirement in the UK Declaration that Cyprus should guarantee human rights, the RC guaranteed human rights comparable to those set out in the European Convention on Human Rights and First Protocol; and that Article 1 stipulates in pertinent part that the territory of the Republic of Cyprus shall comprise the Island of Cyprus together with the islands lying off its coast, with the exception of the United Kingdom's military bases. Article 10 provides for arbitration in case of disagreement.
[20] The Constitution of the RP was drawn up in Greek and Turkish (Art. 180), but I must rely on the translation in Blaustein & Flanz (eds.), Constitutions of the Countries of the World (1972).

Article in the Basic Structure, whilst Article 50 implements Article 8, in providing (in pertinent part) that "The President and the Vice-President of the Republic, separately or conjointly, shall have the right of final veto on any law or decision of the House of Representatives or any part thereof concerning - (a) foreign affairs, except the participation of the Republic in international organisations and pacts of alliance in which the Kingdom of Greece and the Republic of Turkey both participate.[21] This is complemented by Art. 169, which provides that the Council of Ministers shall be responsible (subject, in most cases, to the agreement of the House of Representatives) for the conclusion of international agreements, but makes a saving in Art. 57(3) by providing that if any decision made by the Council of Ministers is of the type referred to in Art. 50, the President and/or Vice-President have a right of veto, which they are to exercise within four days of the date when the decision was transmitted to their respective offices.

35. Article 170 implements Article 23 of the Basic Structure. It reads in pertinent part: "(1) The Republic shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland for all agreements whatever their nature might be."

36. Article 179 provides that the Constitution shall be the supreme law of the Republic and that no law or decision of the House of Representatives, the Communal Chambers, or any other authority shall be repugnant to, or inconsistent with, any of its provisions, whilst Art. 180 provides for adjudication of constitutional questions by the Supreme

[21] For this purpose, the Article goes on to define "foreign affairs" to include (*inter alia*) "the conclusion of international treaties, conventions and agreements". See also Art. 47(m).

Constitutional Court. The latter article, as well as providing for the reconciliation of conflicts between the texts in the two official languages, goes on to say that "In case of ambiguity any interpretation of the Constitution shall be made by the Supreme Constitutional Court due regard being had to the letter and spirit of the Zurich Agreement ... and of the London Agreement...".

37. Article 181 implements Article 21 of the Basic Structure by providing that the Treaties of Guarantee and Alliance shall have constitutional force.

38. Although, under Article 182(2) & (3), most provisions of the Constitution can be amended or repealed by a majority vote comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and a like number of Representatives from the Turkish Community - itself a formidable barrier to amendment - there is an important exception in para. (1). This implements Article 7 of the Basic Structure, and provides that the Basic Articles (set out in Annex III of the Constitution) "which have been incorporated from the Zurich Agreement ... are the basic Articles of this Constitutional and cannot, in any way, be amended, whether by way of variation, addition or repeal". All of the articles mentioned in the present survey of the Constitution are included in this Annex, save for Articles 169 and 179.

39. Article 185 provides that the territory of the Republic "is one and indivisible" and goes on to state in paragraph (2) that "The integral or partial union of Cyprus with any other State or the separatist independence [*sic*] is excluded." This implements Article 22 of the Basic Structure, which defines "separatist independence" as "the partition of Cyprus into two independent States".

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40. Although the Turkish Cypriot community approved of the Constitution, which provided in a detailed way for power-sharing in every aspect of the life of the Republic, the Greek Cypriots soon objected to the Constitution they had agreed to, precisely because they objected to this sort of power-sharing. Major constitutional differences arose between the two communities. No agreement could be reached on the establishment of an army, the Greeks wanting a mixed army and the Turks wanting separate units. Nor could agreement be reached on the setting up of separate municipalities. The Turks also complained that the constitutional requirement that 30 *per cent* of the public service be made up of Turkish Cypriots had not been complied with. By December 1961, the Turkish Cypriots in the House of Representatives were refusing to support the enactment of tax laws in protest at the Government's failure to implement the Constitution.[22]

41. The Supreme Constitutional Court was composed of an independent President, Professor Ernst Forsthoff of Heidelberg University, and two judges from the Turkish and Greek Cypriot communities. The President resigned with effect from 15 July 1963 as a result of Archbishop Makarios' statement that he would not comply with the decision of the Supreme Constitutional Court regarding municipalities.[23]

42. On 12 September 1963, Turkey and the European Communities signed an association agreement, effective on 1 December 1964.

43. On 3 December 1963, Archbishop Makarios, who had frequently expressed his dissatisfaction with the constitutional arrangements (even though he was party to them) publicly announced his thirteen point proposal for amendment of the Constitution and

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[22] See e.g. Kyriakides, *op. cit.*, n. 1 above.
[23] Necatigil, *op. cit.*., n. 2 above, p. 21.

informed the Guarantor powers of the proposal. Several of these proposals, such as the abolition of the right of veto, would have amended unamendable articles of the Constitution. Turkey and the Turkish Cypriots rejected the Archbishop's proposal on 16 December 1963. On 21 December 1993, inter-communal violence began.[24]

44. The Foreign Affairs Committee of the British House of Commons held in their 1987 Report that "There is little doubt that much of the violence - which the Turkish Cypriots claim led to the total or partial destruction of 103 villages and the displacement of about a quarter of the total Turkish Cypriot population - was either directly inspired by, or certainly connived at, by the Greek Cypriot leadership."[25] The Committee also commented:

In brief, the outcome of the 1963 crisis was the collapse of the system of government established under the 1960 settlement. Although the Cyprus Government now claims to have been seeking to "operate the 1960 Constitution, modified to the extent dictated by the necessities of the situation", this claim ignores the fact that both before and after the events of December 1963 the Government of President Makarios continued to advocate the cause of *Enosis* and actively pursued the amendment of the Constitution and the related Treaties to facilitate his ultimate objective.[26]

45. On 25 December 1963, Turkish jet fighters overflew the island. This enabled the Turkish army contingent, stationed pursuant to the Treaty of Alliance, to move away from the Greek contingent to a camp on the Nicosia-Kyrenia road. It seems that, on 1 January 1964, Archbishop Makarios announced his decision to abrogate the Treaties of Guarantee and Alliance, but that, after discussions with British representatives, he issued

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[24] *Ibid.*, p. 24.
[25] House of Commons Papers, 1986-87, Nos. 21-24; No. 21 at paragraph 27.
[26] *Ibid.*, paragraph 31. Indeed, on 26 June 1967 the Greek Cypriot House of Representatives unanimously passed a resolution affirming its intention to continue to struggle for *enosis*.

a new statement that his Government merely sought "to secure the termination of these treaties by appropriate means".[27]

46. In March 1964, the United Nations Security Council decided to send a peacekeeping force to the Island.[28] (The Republic had joined the UN in September 1960.)

47. After the outbreak of the inter-communal violence, the Turkish Cypriot Vice-President and ministers and the Turkish Cypriot Members of the House of Representative were prevented from attending their ministries or meetings. The Greek Cypriot government announced that it no longer recognised Dr Kutchuk in his capacity as Vice-President. The UN peacekeeping force conveyed the request by the Turkish Cypriot Members to return to the House, and was told that they would only be allowed to return if they accepted constitutional changes enacted in their absence by the Greek Cypriot members.[29]. It appears that Turkish Cypriot judges attended the courts in Greek Cypriot controlled areas until 2 June 1966, on which date they were stopped at checkpoints near the law courts and prevented from further attending.[30]

48. A number of Statutes were enacted to amend the Constitution including Basic Articles of the Constitution. For instance, the Electoral (Transitional Provisions) Law 1965 abolished separate Greek and Turkish Cypriot electoral rolls in breach of Articles 1

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[27] Necatigil, p. 46.
[28] SC res. 186 (1964).
[29] UN Secretary General's Report S/6569 of 29 July1965, paras 7-11, cited in the Foreign Affairs Committee 1987 Report (above, n. 25), paragraph 31. I note that it is Greece's position that the Vice President publicly declared that the Republic of Cyprus had ceased to exist and, "along with the three Turkish Cypriot ministers, the Turkish Cypriot members of the House and the Turkish Cypriot civil servants withdrew from the Government": Greece's International Position. 3. The Cyprus Issue (no date), p. 3.
[30] Necatigil, pp. 62-3.

(a Basic Article) and Article 63. Amongst other consequences, this prevented the Turkish community from electing a Turkish Vice-President. This was the subject of protest notes from two of the Guarantor powers, the United Kingdom and Turkey[31].

49. From December 1963 onwards, there emerged two administrations: a Greek Cypriot administration operating under name of the Government of the RC, and a Turkish Cypriot administration which in due course took the title of "Provisional Cyprus Turkish Administration".

50. Between 1968 and 1974, inter-communal talks were held, without a resolution of the conflict.

51. On 21 May 1973, the European Communities and the Republic of Cyprus signed an association agreement.

52. On 2 July 1974, Archbishop Makarios wrote to the President of Greece asking him to withdraw the military junta's officers from Cyprus after he had discovered evidence that they were plotting to kill him and were seeking to achieve *enosis* by abolishing the Republic[32].

53. On 15 July 1974, Greek officers of the National Guard, with the connivance of the mainland Greek junta, led a *coup d'état* against the government of Archbishop Makarios with the intention of overthrowing him and setting up a government to unite Cyprus with Greece, ceding some of the territory of the Island to Turkey. Mr Nicos Sampson, a former EOKA member, was purportedly installed as President. However, the

[31] Hansard, vol. 709, col. 466f, cited in Necatigil, op. cit., p. 57.
[32] 'The Times', 21 July 1974, cited in Necatigil, p. 88.

Archbishop escaped and broadcast the need for resistance. The Presidential Palace was in ruins, a curfew was imposed, and massacres were being reported. The Archbishop was flown to London and reported that both communities were suffering as a result of the coup.[33] On 18 July, in the Security Council, he again complained about a Greek invasion and about the aggressive violation of the sovereignty and independence of the RC.[34]

54. On 17 July 1974, the Turkish Premier flew to London to discuss joint action with the United Kingdom pursuant to the Treaty of Guarantee. The United Kingdom declined to act.[35]

55. On 20 July 1974, Turkey intervened militarily in Cyprus by sea and air with the declared intention, as co-guarantor, of restoring the independence and constitutional order of Cyprus and ending the aggression.[36]

56. On the same day, the UN Security Council adopted Resolution 353, which stated that it was "concerned about the necessity to restore the constitutional structure of the Republic of Cyprus, established and guaranteed by international agreement", called for all military personnel other than those present under the authority of international agreements to be withdrawn, and for the Guarantor powers to "enter into negotiations

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[33] Necatigil,. p. 89.
[34] SC Official Records, 1780th mtg., p. 3.
[35] Necatigil, p. 94. The reasons were not stated expressly, but seem to have been political rather than legal.
[36] *Ibid.* It will be recalled that, under the second paragraph of Article 3 of the Treaty of Guarantee, "In so far as common or concerted action may prove impossible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs established by the present Treaty".

without delay for the restoration of peace in the area and constitutional government in Cyprus...".

57. On 23 July 1974, the Greek military junta called a cease-fire and the following day handed over power to a civilian government.[37]

58. Meanwhile, foreign newspapers carried reports of destruction of Turkish villages, massacres of Turkish Cypriots and killings on both sides. The *Herald Tribune* reported that 1,750 Turkish men were being kept behind barbed wire in an open-air football stadium. Famagusta was under siege from mortar attack.[38]

59. On 30 July 1974, the Foreign Ministers of the Guarantor powers issued the Geneva Declaration[39] and agreed that there should be re-establishment of constitutional government in Cyprus. Among the matters to be discussed should be the "immediate return to constitutional legitimacy, the Vice-President assuming the functions provided for under the 1960 Constitution" - an acknowledgement that the situation obtaining since 1963 had not been constitutional. The Ministers further noted "the existence in practice in the Republic of Cyprus of two autonomous administrations, that of the Greek Cypriot community and that of the Turkish Cypriot community". They also signed a "Brief Statement" in which they made it clear that their adherence to that declaration "in no way prejudiced their respective views on the interpretation or application of the 1960 Treaty of Guarantee or their rights and obligations under that Treaty". They agreed that further talks should begin on 8 August 1974. However, those talks broke down on 14 August 1974.

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[37] *Ibid.*, p. 96.
[38] *Ibid.*, p. 99.
[39] *Ibid.*, p. 424.

60. Further military action following the breakdown of the talks resulted in the securing of territory in the north of the Island under the administration of the Turkish Cypriots.

61. In December 1974, the Archbishop returned to Cyprus and resumed the Presidency.

62. On 12 January 1975, Greece applied for full membership of the European Community.[40]

63. On 13 February 1975, the Turkish Federated State of Cyprus was proclaimed. The Security Council passed resolution 367 on 12 March, which *inter alia* called on all States and the parties concerned "to refrain from any action which might prejudice the sovereignty, independence, territorial integrity and non-alignment of the RC, as well as from any attempt at partition of the island or its unification with any other country"; regretted the proclamation; but also affirmed that it did not prejudice the final political settlement of the problem of Cyprus and took note of the declaration that this was not the intention.

64. In August 1975, both sides agreed at inter-communal talks in Vienna to voluntary regrouping of populations, the Turkish Cypriots in the North of the Island and the Greek Cypriots in the South.[41]

65. On 3 August 1977, Archbishop Makarios died.

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[40] EC Bulletin 1975, No. 6, points 1201-12.
[41] *Ibid.*, pp. 106, 154-5.

66. In 1981 Greece joined the European Community. Previously, on 5 February 1980, the European Community had assured Turkey that Greek accession would not affect its relations with Turkey[42]. In fact, however, Greece has blocked Turkey's attempts to obtain admission to the Community - now the EU.[43]

67. On 15 November 1983, the independent Turkish Republic of Northern Cyprus ("TRNC") was proclaimed by the Legislative Assembly of the Turkish Federated State of Cyprus. Turkey recognised the TRNC the same day. No other state has so far done so.

68. On 18 November 1983, the UN Security Council adopted Resolution 541, in which it "deplored" the proclamation of the TRNC, which it considered to be "incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee" and invalid. It went on to call upon all states "not to recognise any Cypriot state other than the Republic of Cyprus".

69. On 7 May 1985, the Constitution of the TRNC came into force.

70. On 4 July 1990, the administration in Nicosia applied for the RC's accession to the European Communities pursuant to Article 237 of the EEC Treaty, Article 205 of the Euratom Treaty and Article 98 of the ECSC Treaty.

71. On 12 July 1990, the President of the TRNC sent a Memorandum to the Council of Ministers setting out its objections to the application for accession made by the

[42] Redmond, *op. cit.*, n. 3 above, p. 40.
[43] *Ibid.*, pp. 30, 39.

authorities in Nicosia and advising that it would welcome membership for both communities on settlement of their dispute. A Supplementary Note was added to this, dated 3 September 1990

72. On 30 June 1993, EU the Commission handed down a favourable opinion on Nicosia's application.[44] It is clear that the Commission was motivated in part by a belief that accelerating this process would help bring about a political resolution of the Cyprus dispute. On 4 October 1993, the Council of the European Union concluded that it supported the Commission's approach.

73. On 19 December 1994, Greece vetoed a customs union with Turkey[45].

74. On 6 March 1995, the General Affairs Council of the European Union agreed on the general policy framework for the development of relations with Cyprus. On 16 June 1995, the Association Council of the European Union met for talks which centred on Cyprus's prospective accession to the European Union. On 12 July 1995, the European Parliament adopted a resolution endorsing the Commission's opinion and the Council's conclusions. On 17 July 1995, the Council decided on structured dialogue to bring Cyprus closer to the European Union; and on 21 November 1995, the Council and the authorities in Nicosia concluded a Protocol on financial and technical co-operation. Detailed discussions about accession are due to begin after the conclusion of the EU Inter-Governmental Conference.

75. On 13 December 1995, the European Parliament approved Turkey's accession to the Customs Union with the European Union[46].

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[44] Doc. COM/93/313 final.
[45] Necatigil, p. 411.

76. On 26 November 1996, the UK Foreign Secretary, Mr. Malcolm Rifkind, announced in the House of Commons that it would be "extremely difficult" for a divided Cyprus to be admitted to the EU.[47] The official position of the new Labour Government is still unknown.

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THE LAW

The Relevant International and National Law

77. The duties of the RC and the Guarantor States turn on the proper construction of the London Agreements (in which term I include the Treaties subsequently formally concluded at Nicosia on the basis of what was agreed in London in February 1959 - itself largely on the basis of the Zurich Agreements), together with the (original) Constitution of Cyprus. Before addressing their substantive provisions, it is necessary to consider a series of preliminary questions, relating to the initial validity and possible subsequent cessation of effect of the treaties.

Are the treaties valid in international law?

78. Some commentators sympathetic to the Greek Cypriot view have suggested that the Zurich-London Agreements and the 1960 Treaties may not be valid in

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[46] Press Release by the Republic of Turkey on Internet home page, Relations with EU, Washington DC, 13 Dec. 1995.
[47] From 87 *Cyprus News* (1996), p. 3.

international law because they were imposed on the inhabitants of Cyprus, whose representatives did not have the opportunity of negotiating them.[48]

79. However, the facts outlined above demonstrate that the Greek Cypriot community was advised at an early stage of the details of the Zurich Agreement, and more importantly that they were actually involved in the negotiation of the London Agreement and the 1960 Treaties. For example, in the minutes of the Foreign Office meeting, the Greek Foreign Minister is recorded as advising that Archbishop Makarios had been informed of the Zurich Agreement on, inferentially, either the day of the signing of the Zurich Agreement or the following day; also, that the Archbishop would have the opportunity of reviewing the Zurich Agreement on the evening of 12 February.

80. The London Conference commenced on 17 February 1959 and this was attended by Archbishop Makarios for the Greek Cypriots and Dr Fazil Kutchuk for the Turkish Cypriots. Further, the London Agreement comprises a number of documents including a "Declaration made by the Representative of the Greek-Cypriot Community on February 19, 1959". As stated above, Archbishop Makarios declared in this that he had examined the Zurich Agreement and the Declarations of 17 February 1959 and accepted these as the agreed foundation for the final settlement of the problem of Cyprus. In addition, Archbishop Makarios signed or initialled all the documents comprising the London Agreement, including the Treaties of Alliance and Guarantee, with the exception of the Memorandum of the Conference (which was signed by the Premiers of the Guarantor Powers only) and the Agreed Measures (which was initialled by the Foreign Ministers of the Guarantor Powers only).

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[48] See e.g. Palmer, "The TRNC: Should the United States Recognize it as an Independent State?", 4 *Boston Univ. Int. Law Jl.* (1986), p.425, esp. at pp. 431-3. Cf. Press & Information Office, RC, The Cyprus Problem (1995), pp. 6-8.

81. According to the Agreed Measures, a Joint Committee in London was to prepare the final treaties "giving effect to the conclusions of the London Conference". This was to consist of a representative from each of the Parties including one from the Greek Cypriot community (as well as one from the Turkish Cypriot community). The Joint Committee took fifteen months to complete negotiations, which took place in both London and Cyprus. This strongly suggests that the Greek Cypriots had the opportunity of thoroughly negotiating these Treaties. As a result, the wording of the Treaties of Guarantee and Alliance were slightly amended. (There was no pre-existing draft of the Treaty of Establishment.)

82. On 16 August 1960, the Treaties of Guarantee, Alliance and Establishment were signed in Nicosia; amongst the parties to sign it was Archbishop Makarios, who was by now President-elect.

83. From the above, it does not seem to me to be arguable that the Treaties were imposed on the Greek Cypriot community without their consent. Admittedly, this consent may have been grudging: Archbishop Makarios was at the time strongly in favour of *enosis*. According to the Greek Cypriot Press and Information Office, "the only reason the Cypriot people's representatives signed them was because the sole alternative would have been the continued denial of independence and freedom, continued bloodshed and, possibly, the forced partition of Cyprus".[49] But just because the Greek community had to settle for something less than its ideal does not mean that it or its representatives were coerced within the narrow meaning of coercion to be found in, for instance, Articles 51 and 52 of the Vienna Convention on the Law of Treaties

[49] The Cyprus Problem (n. 48 above), p.6.

1969. So far as I am aware, it has not been suggested that there were any acts or threats directed against the person of the Archbishop, nor the threat of force against the RC itself. Mere inequality of bargaining power does not constitute coercion.

84. It has also been argued that the Treaty of Guarantee is void because Article IV, in allowing for the unilateral use of force to maintain the *status quo* in Cyprus, conflicts with a rule of *ius cogens* (a peremptory norm of general international law) - that is, a norm accepted and recognised by the international community of States as a whole as a principle from which no derogation is permitted. Pausing here, it should be noted that there is considerable disagreement in the international community as to exactly what norms are comprised in this category. It has to be conceded, however, that the prohibition of the use of force against the territorial integrity or political independence of a State is a rule which definitely does fall into this category.[50]

85. But the Vienna Convention is not retrospective;[51] and before 1969 the very existence of *ius cogens* in international law was very much contested. Therefore, even if - for the sake of argument - the provisions permitting intervention would contravene a norm of *ius cogens* under present-day law, it by no means necessarily follows that Article IV of the Treaty of Guarantee - still less the Treaty as a whole - would have been void *ab initio*. It is true that Art. 64 of the Vienna Convention provides that "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". But first, this does not retrospectively invalidate the treaty; and secondly, even if Art. IV of the Treaty of Guarantee became invalid as the result of an new rule of *ius cogens*, that Article could

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[50] Cf. the International Law Commission's Commentary to Art. 50 of its draft articles on the Law of Treaties, Report of the ILC on the 2nd part of its 17th session and on its 18th Session, GA Off. Records, 21st Sess., Supp. No. 9, p. 76; Military & Paramilitary Activities in & against Nicaragua, ICJ Rep. 1986, pp. 100-1.

[51] Article 4.

very possibly be severed from the rest of the Treaty, and it is Arts. I & II which are in issue here.[52]

86. Furthermore, and very importantly, the Vienna Convention[53] lays down a formal procedure to be followed in the event that a party to a treaty invokes a ground for impeaching its validity of that treaty. This procedure involves a formal notification in writing to the other parties to the treaty. Although the Greek Cypriot administration has from time to time made imputations about the London Agreements, and in particular the Treaty of Guarantee, so far as I am aware, no party has invoked this procedure or taken other formal steps. Indeed, in the case of *Cyprus v. Turkey* before the European Commission of Human Rights, the Greek Cypriot administration, whilst arguing that the Turkish intervention of 1974 violated the Treaty of Guarantee, appears to have accepted the validity of the Treaty as such.[54] This is corroborated by its argument that the establishment of the Turkish Federated State of Cyprus "was incompatible with the constitutional structure of the Republic of Cyprus as envisaged by the Cyprus Constitution and contrary to the Treaties of Establishment and Guarantee...".[55] The Declaration adopted by the Turkish Cypriot Parliament on 15 November 1983 unequivocally states that the TRNC "shall continue to adhere to the Treaties of Establishment, Guarantee and Alliance".[56]

87. In any event, the three Guarantor States themselves do not appear to regard the London agreements as invalid. Turkey certainly does not, and indeed relied on the Treaty of Guarantee to justify its 1974 intervention. So far as Greece is concerned,

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[52] Art. 44 of the Vienna Convention prohibits separation in respect to treaties which contravene Art. 53, but not 64. Cf. also Art. 71(2)(b).
[53] Articles 65-68.
[54] ECHR, 13 Decisions & Reports (1978), p. 116.
[55] *Ibid.*, pp. 119-20.
[56] Paragraph 23(e).

although it maintains that the *Constitution* became unworkable, it has not, I am advised and so far as I know, taken the position that the London Agreements are invalid or not otherwise in force. Indeed, by arguing that the establishment of the TRNC is a violation of the 1960 agreements, and by emphasizing its special position as a "guarantor power with special legal responsibility regarding the Republic of Cyprus" it evidently relies upon them.[57]

88. The United Kingdom apparently does not question the validity of the treaties either. In 1979 the Government spokesman, in explaining why they recognized only one Government in Cyprus, relied expressly on the 1960 agreements.[58] In 1987 Baroness Young, Minister of State at the Foreign and Commonwealth Office, confirmed to the Foreign Affairs Committee of the House of Commons that "We believe that the 1960 Treaty of Guarantee still applies in which we are a guarantor and continue to play that role ...".[59] More recently, the acting head of the Southern European Department of the Foreign and Commonwealth Office swore an affidavit on 25 April 1994 in the case of *R. v. The Commissioners for the Inland Revenue, ex parte Resat Caglar,* in which he asked the Court to take into account "the obligations of the United Kingdom under the Treaty of Guarantee".[60]

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[57] See e.g. Greece's International Position. 3: The Cyprus Issue, pp. 7 & 11. See also the Geneva Declaration by the three Guarantors of 30 July 1974, above, para.60.
For the sake of completeness, I should also deal with the suggestion that the RC's consent to the Treaties of Guarantee and Alliance was not valid, because the House of Representatives did not approve ratification (see e.g. The Cyprus Problem, n. 48 above, p. 8.) But this argument does not seem applicable to a State *in statu nascendi*; and in any case, so far as I know it has not been formally invoked by the Greek Cypriot administration as a ground of invalidity.

[58] Parliamentary Debates (Lords), vol. 401, col. 2024 (25 July 1979).

[59] 1986-87 Session, 3rd Report, Minutes of Evidence, question 100.

[60] "UK Materials on International Law 1994", 65 BYIL (1994) 590.

89. The Security Council, too, has apparently recognized the validity of these agreements more than once. For instance, in Resolution 353 (1974) it pronounced itself "concerned about the necessity to restore the constitutional structure of the Republic of Cyprus, established and guaranteed by international agreement"; and in Resolution 541 (1983), it asserted that the declaration of independence by the TRNC was "incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee".[61] In Resolution 774 of 26 August 1992, it endorsed, as "the basis for reaching an overall framework agreement", the Secretary-General's "Set of Ideas on an Overall Framework Agreement on Cyprus" which, amongst other things, confirms the continuation in force of the 1960 Treaties of Guarantee and Alliance.[62]

90. In conclusion, it appears therefore that an argument based on the invalidity of the London Agreements and the Treaties which resulted from them is unfounded.

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Have these Agreements been terminated?

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91. Treaties may be terminated by either consent of the parties, or by virtue of a rule of law authorizing their termination[63]. Since there has been no agreement of all the parties to the termination of the Agreements, the only possible question is whether there is a rule of law authorizing such termination.

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[61] There is a possible view that the Security Council and General Assembly have doubts about the validity of the Treaty of Alliance: cf. GA Resolution 33/15 of 1978 and SC Res. 927 (1994), calling for, respectively, a total withdrawal, or a reduction of, foreign troops in Cyprus. However, the Treaty of Alliance does not seem to be in issue in the context of the present Opinion.

[62] UN doc. S/24472 (21 Aug. 1992), paragraph 54.

[63] Cf. Vienna Convention on the Law of Treaties, Arts. 54-72. Suspension of the treaties does not seem to be an issue here.

92. Three grounds of termination could theoretically require consideration: (1) material breach by one of the parties; (2) supervening impossibility of performance; and (3) fundamental change of circumstances.[64] But in the circumstances of the present case it seems unnecessary to inquire further into whether any of these grounds are present here. The reason is that, as just indicated in relation to the alleged initial invalidity of the Treaties, none of the parties seems to have formally sought to terminate the treaties or withdraw from them on any of these grounds - not even the Greek Cypriot administration.[65] And even if I were wrong about the position of the latter, the three Guarantor Powers have not taken this position but, as we have already seen, in fact continue to rely on the Agreements for various purposes. The same is true of the Security Council.

93. So far as the United Kingdom is concerned, to date the official position remains as I have described it above. Indeed, apart from legal considerations, it would be surprising if, even as a matter of policy, the British Government were to perceive it to be in its interest to change that approach, not least for the reason given by the House of Commons Foreign Affairs Committee in 1987:

> The interlocking nature of the founding treaties of the Republic of Cyprus effectively compels the United Kingdom Government to continue to subscribe to the Treaty of Guarantee if the whole edifice *(including British sovereignty over the [Sovereign Base Areas])*[66] is not to collapse. As the Greek Cypriot Foreign Minister so eloquently put it to us in evidence, 'one thing Britain cannot do is to have *à la carte* application of parts of the Treaties only'."[67]

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[64] *Ibid.*, Arts. 60-62. Emergence of a new rule of *ius cogens* has already been discussed.
[65] There may be a suggestion to the contrary so far as concerns the latter's position regarding the Treaty of Alliance; cf. Tornaritis (Attorney-General of the Greek Cypriot administration), Cyprus and its Constitutional and other Legal Problems (2nd ed., 1980), p. 60; but the Treaty of Alliance is not in issue here.
[66] Emphasis added.
[67] 3rd Report, 1987-87 Session, paragraph 10.

The 1960 Constitution

94. The main points of the future constitution of Cyprus were contained in the Basic Structure agreed at Zurich, which was supplemented at the London Conference in 1959.[63] As already indicated, that Conference also adopted "Agreed Measures" providing (amongst other things) for a Joint Commission in Cyprus to complete a draft Constitution incorporating these articles and the relevant provisions of the other agreements reached in Zurich and London. The Joint Commission was to be made up of one representative from each of the parties to the London Agreement (except the UK). The Joint Commission took fourteen months to negotiate the draft Constitution and made some amendments to what was agreed at the London Conference. The draft was signed on 6 April 1960 in Nicosia.

95. The Constitution was given international standing by the Zurich - London Agreements, which the Greek Cypriot representative, Archbishop Makarios, declared he accepted as the "agreed foundation for the final settlement of the problem of Cyprus" - and in particular by the Treaty of Guarantee. I analyse the relevant treaty provisions in the next section; but first, I consider the Constitution itself, for the regime which it establishes is what was guaranteed.

96. The Constitution provides for political equality between the two communities, notwithstanding the numerical superiority of the Greek Cypriots. Accordingly, it contains many checks and balances to maintain this *status quo*, and is more complex and detailed than most constitutions of newly independent states. As we have seen, in 1963, Archbishop Makarios sought to amend the Constitution, including some unamendable provisions; and when the Turkish community withheld its (requisite) approval, he

[63] Above, paragraphs 4-30.

anyway purported to enact certain laws which were clearly incompatible with the Constitution, including its unamendable provisions.

97. National constitutions are often not only amended in accordance with their terms, but also overturned by bloodless or bloody *coups*. If they are overturned, whatever the legality under the "old" constitution, in practice, *if the coup is successful*, the new constitution comes to prevail. And international law does not in general prohibit such acts.[69] However, the case of Cyprus is different. As we have seen, the basic structure of the constitution is guaranteed (and not just by the Guarantor Powers, but by the RC itself) in the Treaty of Guarantee and the Agreed Measures in particular. Furthermore, Article 182 and Annex III made certain articles, including those enshrining the bi-communal arrangements and that giving constitutional force to the Treaties of Guarantee and Alliance,[70] unamendable "Basic Articles".[71] In short, the bi-communal structure of Cyprus was sanctified by "particular" international law, binding on the various parties. But it is arguable that these arrangements also became part of general international law. There may also be similarities here to the status of Switzerland, whose permanent neutrality has long been recognized as part of the general "public law of Europe".[72] Indeed, the similarity is not just due to the fact that this status was initially guaranteed by treaty a limited number of European powers; it extends to the *reason* for that permanent neutrality, which was in large part that, due to the different ethnic composition of the various cantons, if the Swiss Confederation did not maintain its neutrality in wars between or involving France, Italy or Germany, it risked being torn apart.

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[69] Though human rights conventions and customary law may impose some limitations.
[70] Article 181.
[71] See above, paragraph 38.
[72] See e.g. Rousseau, II Droit international public (1974), 308.

98. The official position of the Greek Cypriot authorities with regard to the constitutional crisis of 1963 is that the Constitution "proved unworkable in many of its provisions and this made impossible its smooth implementation"[73]. They apparently maintain that they are continuing to operate the 1960 Constitution, subject to the doctrine of necessity. This is how they put it in the case of *Cyprus -v- Turkey*:[74] " The Constitution of the Republic remains in force and is applied by the Government of Cyprus subject to the well established doctrine of necessity, i.e. to the extent that it is impossible to comply with some of its provisions that require the participation of the Turkish Cypriots, the Government has to take exceptional measures which, though not in conformity with the strict letter of the Constitution, are necessary to save the essential services of the State temporarily until the return to normal conditions so that the whole State might not crumble down".

99. This statement is, however, open to question. In the first place, the state of necessity seems to have been largely self-induced. Secondly, as a matter of *constitutional* law in common law countries, it is very controversial whether necessity is in fact a justification for violating the provisions of the constitution. Moreover, it is not just a question of domestic law: as we have seen, the constitutional settlement in this case was underpinned by valid and subsisting international commitments.

Application of the relevant provisions of the Treaties and Constitution

100. On 4 July 1990, the authorities in Nicosia applied for accession to the (then) European Communities. The TRNC responded by sending to the Council of Ministers

[73] "RC", Cyprus: The Way to Full EU Membership (3rd ed., 1995), p. 5.
[74] European Commission on Human Rights, 13 Decisions & Reports (1978), p.116.

a Memorandum dated 12 July 1990, and a Supplementary Note dated 3 September 1990, setting out its objections to the application.

101. The European Commission handed down a favourable opinion on 30 June 1993. In its opinion, the Commission referred to the challenge to the application by the "*de facto* authorities of the northern part of the island". It went on:

> these authorities rejected the right of the Government of the Republic of Cyprus to speak for the whole of Cyprus in such an approach. They based their position on the Guarantee Treaty and the wording of the 1960 Constitution, which grants the President and Vice President (a Turkish Cypriot) a veto over any foreign policy decision, particularly any decision on joining an international organisation or alliance that does not count both Greece and Turkey among its members. They consider, accordingly, that in the prevailing circumstances the Community should not take any action on the application.

The Commission dismissed these arguments by stating that: "The Community, however, following the logic of its established position, which is consistent with that of the United Nations where the legitimacy of the government of the Republic of Cyprus and non-recognition of the 'Turkish Republic of Northern Cyprus' are concerned, felt that the application was admissible".[75]

102. There is no proper analysis of the TRNC's argument, so it is unclear what exactly is the "logic of the Community's established position". What the Commission seems to have meant was that, having adopted a policy of non-recognition of the TRNC, it had to recognize the Nicosia authorities as alone entitled to represent the RC. Be that as it may, it appears, however, that the Commission's main concern at this time was whether Cyprus met the European Community's own requirements for membership, not

[75] Doc. COM/93/313 final, 30 June 1993, p. 4.

whether there were any impediments to membership under the Treaties establishing the Republic, or the Republic's own Constitution.

103. No further reference was made to these legal arguments in either the Council's conclusion that it supported the Commission's opinion on 4 October 1993, nor in the European Parliament's resolution of 12 July 1995 endorsing the Commission's opinion and the Council's conclusions.

104. There are valid objections, however, to the application to join the European Union, based on the London, Zurich and Nicosia agreements, which I shall now discuss.

105. A very important provision in this regard is Article I(2) of the Treaty of Guarantee, by which "[The Republic of Cyprus] undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited all activity likely to promote, directly or indirectly, either union with any other State or partition of the Island." This language is certainly wide enough to cover the accession of the RC to the EU.

- Membership would amount to participation in whole, let alone in part, in an economic union.[76]

- To the extent that the EU also constitutes a political union, this part of the undertaking would also be infringed.

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[76] There are some interesting parallels here with the Austro-German Customs Union case (1931), PCIJ Ser. A/B, no. 41, p. 37, in which the Permanent Court of International Justice held that Austria's entry into a customs union with Germany would constitute an alienation of its economic independence, contrary to Geneva Protocol I of 4 October 1922.

- Membership would also be "likely to promote, directly *or indirectly*, union with" Greece. The very name of the organization, the European Union, bears out the fact that it is about union between the members..

106. It might perhaps be objected that the text uses the singular "any State" in two places, whereas the union in question would be with *States*. However, such an objection would be unfounded. Admittedly, what the framers were particularly concerned about was union with either Greece or Turkey - single States. Nevertheless, as a matter of drafting and the ordinary use of the English (and French) language, the singular usually includes the plural and "any State (whatsoever)" is wide enough to encompass "any States (whatsoever)".[77] This interpretation also accords with common-sense. Suppose, for example, that Cyprus had joined an economic or political union whose only other members were Greece and, say, Malta. It is hard to believe that this would not have come very close to *enosis*, and sufficiently close for the draftsmen, if asked by the proverbial "officious bystander", to have replied that they certainly intended to prohibit such a thing. It would be no answer to this point to observe that we are here dealing with a union involving fifteen other States, not two. Cyprus is far more closely connected to Greece politically, militarily, economically, ethnically, and geographically, than it is to any other member State, and this situation would no doubt continue after accession. Furthermore, it should be noted that in Article I(2) the Republic not only undertook to refrain from participating in any political or economic union: it even promised to refrain from "*any activity* aimed at promoting, *directly or indirectly* ... union of Cyprus with any other State".

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[77] The UK's Interpretation Act 1978 (c. 30), s. 6 provides, for instance: "In any Act, unless the contrary intention appears ... (c) words in the singular include the plural and words in the plural include the singular". Similarly section 1 of the Code of the Laws of the United States of America:1 USC, sect. 1, (1982).

107. It is not just the RC who gave undertakings in this regard. The counterpart of its undertaking in Art. I(2) is that of the three Guarantors, in Art. II(2). Having noted the RC's undertakings, they "likewise undertake to prohibit, so far as concerns them (pour ce qui relève d'eux), any activity aimed at promoting, directly or indirectly, ... union of Cyprus with any other State". It follows, in my view, that the two Guarantors concerned, the UK and Greece, are under an obligation of their own to refrain from promoting Cyprus' membership of the EU and, indeed, to use their veto to prevent it.

108. Various provisions of the Cyprus Constitution bear out this interpretation.[78] It will be recalled that in Art. I of the Treaty of Guarantee, the RC undertook to ensure "respect for its Constitution", whilst in Art. II, the three other parties guaranteed "the state of affairs established by the Basic Articles of its Constitution". These Articles derive to a considerable degree from the Basic Structure agreed at Zurich and London, to which the RC, the three Guarantors, and the two Cypriot communities agreed.

- Art. 185(2) provides that "The integral or partial union of Cyprus with any other State ... is excluded".

- Art. 170 provides in pertinent part that "The Republic shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland for all agreements whatever their nature might be." This implements Art. 23 of the Basic Structure. It will be recalled that, at the London meeting of 12 February 1959 of the three Foreign Ministers, the question of its meaning was discussed.[79] In reply to a question from Lord Perth, the Foreign Ministers of Turkey and Greece indicated that "The intention was to exclude more favourable bilateral agreements between Cyprus and

[78] See above, paragraphs 34-39.
[79] Above, paragraph 8.

countries other than the Three Powers, and *also to avoid the possibility of either Greece or Turkey securing a more favourable position in Cyprus than the other - of Greece, for example, establishing a kind of economic enosis*". The proposed entry of the RC into the EU would doubly violate the letter and spirit of this provision. In the first place, it would tend to encourage the kind of economic *enosis* with Greece which the drafters of the Zurich and London agreements plainly intended to prohibit. Secondly, there can be no doubt that, if Cyprus joined the EU, this would result in Greece and the UK receiving considerably more favourable treatment than Turkey, which is not a member.

- Article 50 implements Article 8 of the Basic Structure, in providing (in pertinent part) that "The President and the Vice-President of the Republic, separately or conjointly, shall have the right of final veto on any law or decision of the House of Representatives or any part thereof concerning - (a) foreign affairs, except the participation of the Republic in international organisations and pacts of alliance in which the Kingdom of Greece and the Republic of Turkey both participate." [80] This question, too, came up at the Foreign Office meeting on 12 February 1959, albeit at that stage in connection with the proposed Art. I(2) of the Treaty of Guarantee.[81] In response to the British Foreign Secretary's question whether this provisions would preclude membership in international associations - that is, intergovernmental organizations - such as a possible European Free Trade Area, "M. Zorlu and M. Averoff both made it clear that there would be no objection to Cypriot membership of international associations of which *both* Greece and Turkey were members, e.g. the [Universal] Postal Union, and any Free Trade Area". The corollary is that there could well be objection to membership of an organization of which only one of these two was a member.

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[80] See also paragraph 34 above.
[81] Above, paragraph 7.

- It might perhaps be objected that the mechanism chosen to further this goal was the Vice-Presidential veto, but since there is no longer a [Turkish] Vice-President to wield the veto, the provision is a dead letter. But in my view, such an objection would not be valid. It seems that the main reason why there has not been such an official for some time is that, from 1963/4 onwards, he was prevented by the Greek Cypriots from acting. In any case, the Vice-President's veto was but the mechanism by which the Turkish *community* could be assured that the Republic would not join an organization of which Greece alone was a member (and vice-versa). In other words, it was clearly the intention to prohibit membership of organizations with this sort of partial membership, unless both communities agreed. It is quite clear from the above-mentioned TRNC Memorandum and supplementary Note to the EU that the Turkish community does indeed object.

- The interchange at the Foreign Office meeting also provides the clearest proof that the drafters of the Treaty of Guarantee understood the references in it to "union with any State" to include States (in the plural), and specifically to include international organizations of States, of which the EU is, of course, a specimen. It will be noted that it was specifically in the context of proposed Article I(2) of the Treaty of Guarantee that the exchange took place.

109. I therefore conclude that the application by the Greek Cypriot administration to join the EU is in breach of its treaty obligations, not to mention its purely domestic legal obligations; and, further, that any encouragement of such an application by Greece or the UK, or a failure use their veto or any other necessary means to prevent its succeeding, would be a breach of the treaty obligations of those two States towards each other, towards Turkey, and towards the inhabitants of Cyprus as a whole.

Does the constitution of the European Union permit or envisage applications such as the present one?

110. Article O of the Treaty on European Union reads:

> Any European State may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the member States and the applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements.

111. "European" is deliberately not defined, so as not to limit the frontiers of the European Union.[82] The Commission in its opinion said that Cyprus had "beyond all doubt" a European identity and character. It is less convincing about whether or not the Nicosia authorities can claim to represent all the people of Cyprus and indeed the State of Cyprus, and undertake obligations on their behalf which it is able to perform. On the one hand the Commission advises that the member States of the European Union recognise the Nicosia Government as the only legitimate government representing the Cypriot people; but on the other, the Commission acknowledges the *de facto* partition of the island and separation of the communities, and the consequence that:

> the fundamental freedoms laid down by the Treaty, and in particular freedom of movement of goods, people, services and capital, right of establishment and the universally recognized political, economic, social and cultural rights could not today be exercised over the entirety of the island's territory. These freedoms

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[82] Booss & Forman, "Enlargement: Legal & Procedural Aspects", 32 CML Rev. (1995), pp. 95, 98.

would have to be guaranteed as part of a comprehensive settlement restoring constitutional arrangements covering the whole of the Republic of Cyprus.[83]

112. The European Court of Justice has itself highlighted the practical difficulties which stand in the way of effect being given to the principles to which the Commission referred. R. v. Minister of Agriculture, Fisheries & Food, ex. parte S. P. Anastassiou (Pissouri) Ltd. [84] arose on a request from the English High Court of Justice for a preliminary ruling. It concerned the question of the certification of agricultural products originating in Cyprus, under the EEC-Cyprus Association Agreement. The goods in question originated in the TRNC, and the UK and the Commission argued that, in the circumstances obtaining in Northern Cyprus, Member States were obliged to accept movement and phytosanitary certificates emanating from the *de facto* authorities there, in order to prevent discrimination between nationals or companies of Cyprus. The Court recognized the practical difficulties, but in its Judgment[85] held that this did not warrant a departure from the clear terms of the 1977 Protocol on the origin of products and administrative cooperation, when the Community and its members, and of course the Nicosia authorities themselves, did not recognize the TRNC.

113. The TRNC has argued that the Greek Cypriot Government has no authority to represent the whole of the country, or the Northern part of it. But aside from that, there can be little doubt that the Anastassiou case is symptomatic of the practical and legal problems that can arise if the RC is admitted to the EU. The Nicosia Government will in many respects not be in a position to fulfil its undertakings towards the other Members; and the other Members may well experience practical difficulties in fulfilling their obligations towards Cyprus as a whole. Moreover, the EU is not only the about

[83] Opinion of the Commission, doc. COM/93/193 final, paras 8-10.
[84] [1994] 1 ECR 3087.
[85] Esp. at paragraph 37 ff.

reciprocal rights and duties of States: it is also about individual rights of the citizens of the Union, and in that regard, too, there could well be very serious difficulties. [86]

114. No member has yet been admitted to the EU whose writ did not run over virtually the whole of its territory.[87] But the Greek Cypriot administration it is unable to exercise its authority over about one-third of the territory which it claims to represent. The difficulties to which this could give rise would be unprecedented in the history of the Union.

115. In its Opinion, the Commission frankly recognized these difficulties. But its solution was to press on regardless. It seems to hope that, by agreeing that the Greek Cypriot administration is eligible for admission, it will assist the Security Council or otherwise contribute to the political solution of the Cyprus problem. Opinions may differ as to whether the EU's action will prove a positive contribution: the opposite could turn out to be the case. But confining ourselves to the more strictly legal domain, what can be said with confidence is that, if the EU went so far as to admit the RC before a political solution had been reached, the technical difficulties are likely to be very great indeed.

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[86] Cf. Booss & Forman, op.cit., p. 101.

[87] The case of the Federal Republic of Germany before unification with East Germany is not, as it might at first sight appear, a precedent. The Federal Republic did not claim to have, and did not possess, the power to conclude treaties on behalf of East Germany, and it did not purport to exercise sovereignty there. Cf. Mann, "Germany's Present Legal Status Revisited", 1967 ICLQ, 760, reprinted in his Studies in International Law (1973), p. 660, esp. at p. 702; O'Keefe, "The Legal Implications of East Germany's Membership of the European Community", 1990-91 Legal Issues of European Integration, p. 1.

SUMMARY AND CONCLUSIONS

116. The Treaty of Guarantee of 1960, along with its associated instruments, strikes a carefully constructed balance between the interests of the two Cypriot communities, and also between the three States with a particular interest in Cyprus: Greece, Turkey and the United Kingdom. It is the basis of the independence of Cyprus, of the special rights and responsibilities of the Guarantor States, and of the continued military presence of the UK on the island. As has been shown above,[88] there are no convincing grounds for impugning either the initial validity or the continuance in force of the relevant provisions of the Treaty. The Guarantors - the United Kingdom, Turkey and - it seems - Greece indeed continue to recognize its validity, which is also the position of the UN Security Council.

117. Turning to the substance, we have seen[89] that, by Article I(2) of the Treaty of Guarantee, the Republic of Cyprus undertook "not to participate, in whole or in part, in any political or economic union with any State whatsoever". Membership of the EU would constitute participation in whole or in part in an economic union, and at least in part in a political union. The conclusion must be, therefore, that this would be contrary to the Treaty of Guarantee. To try and escape this conclusion by arguing that the Treaty prohibits only union with a State, not States in the plural, would not only do violence to the ordinary meaning of the words, their context and their object and purpose: it would also run counter to the express intentions of the Governments who drafted this provision. For, as has been shown,[90] they considered membership of international economic and political organizations specifically in the context of these clauses in the Treaty. By definition, such organizations would comprise other States, in the plural. The drafters were only prepared to relax this ban if the organization was

[88] Paragraphs 78-99.
[89] Above, paragraphs 105-9.
[90] Above, paragraphs 7 & 108.

one in which both Greece and Turkey both participated: but such is not the case with the EU. Furthermore, Article I(2) goes on to prohibit, not just participation (in whole or in part) in an economic or political union, but even "all activity *likely to promote, directly or indirectly* ... union with any other State...". It cannot be gainsaid that membership of Cyprus in the EU is likely to promote, directly or indirectly, union with other States, and most particularly with Greece.

118. Nor was this the only undertaking of Cyprus. By paragraph (1) of the same Article it also "undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution". And we have also seen[91] that Constitution not only included provisions expressly echoing the words of Article I of the Treaty, but also others directly in point. Article 170 guarantees most-favoured-nation treatment to *each* of the Guarantors whereas, manifestly, if Cyprus became a member of the EU, Greece and the UK would have necessarily to receive more favoured treatment than Turkey. Moreover, Article 50 of the Constitution expressly gave the Turkish Vice-President, as the representative of his community, a veto over Cyprus' membership in any international organization unless both Greece and Turkey were members. These were amongst the select group of unamendable "Basic Articles" in the Constitution which the Republic of Cyprus undertook in the Treaty of Guarantee to respect.[92] For all the above reasons it seems clear that Nicosia would violate its treaty obligations by seeking or accepting membership in the EU.

119. For their part, the Guarantor States also undertook important legal obligations. By Article II(1) of the same Treaty, these three States took "note of the undertakings

[91] Above, paragraph 108.
[92] Above, paragraphs 34-38.

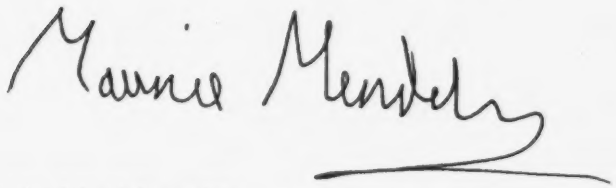
of the Republic of Cyprus in Article I" and "recognize[d] and guarantee[d]", *inter alia*, the state of affairs established by the Basic Articles of the Constitution. Furthermore, in paragraph (2), reflecting the corresponding undertaking by the RC in Article I(2), they "likewise undert[ook] to prohibit, so far as concerns them, any activity aimed at promoting, directly or indirectly, ... union of Cyprus with any other State...". Admittedly, this guarantee is not completely unqualified: it extends only "so far as concerns them" or, as the original version had it,[93] "so far as lies within their power". But it certainly does lie within the power of the UK (and, indeed, of Greece) to prevent a violation of the Treaty by the simple exercise of their veto.

120. Furthermore, given that at least *de facto* (on any view) the writ of Nicosia does not run throughout Cyprus, if that country were to join the EU there would be considerable practical and legal obstacles in the way of Nicosia's implementation of duties which would have to be undertaken towards other members in respect of the island as a whole. For their part, the other members would in practice find it extremely difficult, if not impossible, to carry out their legal obligations in respect of Cyprus as a whole. The EU Commission and Court, as well as the UK Government, have frankly recognized these difficulties;[94] but they have so far failed to draw the appropriate conclusions.

121. The undertakings of the RC and of the three Guarantor States are not mere political statements. They are solemn legal promises embodied in a formal treaty. And what is given by this particular treaty is a *guarantee*,[95] the most solemn form of pledge known to law. All four of the States concerned obtained benefits under the Treaty of Guarantee; but with these benefits came obligations. International law, by which the

[93] Above, n. 13.
[94] Above, paragraphs. 112-5.
[95] Or, more precisely, a series of guarantees.

United Kingdom and other members of the EU set great store, demands that these obligations be performed.



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6 June 1997.

ANNEX II

REPUBLIC OF TURKEY

RE: THE APPLICATION OF THE REPUBLIC OF CYPRUS TO JOIN THE EUROPEAN UNION

NOTE ON AUSTRIA'S ACCESSION TO THE EUROPEAN UNION

I have been informed by the Turkish Ambassador to London that some members of the European Union have been arguing that there is a precedent which assists Cyprus' admission, namely that of Austria. I have been asked to produce a brief note dealing with that argument.

In 1938, Germany annexed Austria. This was known as the *anschluss*. The word in German means both annexation, and joining a union. When Germany was defeated at the end of World War II, Austria was occupied by the Allies and subjected to a joint Allied Control Council (comprising representatives of the Soviet Union, the United States, France and the United Kingdom). In 1955, however, the Soviet Union indicated its readiness to restore Austria's sovereignty, but in return Austria had, amongst other things, to agree to permanent neutrality. This was provided for in the Moscow memorandum between the two countries of April 1955. Austria undertook to make a declaration in a form which would commit it to permanent neutrality, which it did shortly afterwards in its Constitutional Federal Statute. On 15 May 1955 it also entered into the State Treaty for the Re-Establishment of an Independent and Democratic Austria, with the Soviet Union and the other three occupying

Powers.[1] The Treaty itself contained no express provisions on neutrality, but it did contain a number of others, dealing with such matters as the recognition and maintenance of its independence, human rights, denazification, reparations etc.

This is the context of Article 4, which is headed "Prohibition of *Anschluss*", and provides:

> 1. The Allied and Associated Powers declare that political or economic union between Austria and Germany is prohibited. Austria fully recognizes its responsibilities in this matter and shall not enter into political or economic union with Germany in any form whatsoever.
>
> 2. In order to prevent such union Austria shall not conclude any agreement with Germany, nor do any act, nor take any measures likely, directly or indirectly, to promote political or economic union with Germany, or to impair its territorial integrity or political or economic independence. Austria further undertakes to prevent within its territory any acts likely, directly or indirectly, to promote such union and shall prevent the existence, resurgence and activities of any organizations having as their aim political or economic union with Germany, and pan-German propaganda in favour of union with Germany.

The EU nevertheless accepted an application for membership from Austria, and in 1995 it became a full member.[2] Superficially, there are similarities between Article 4 and the relevant parts of Articles I and II of the Treaty of Guarantee of 1960 between the Republic of Cyprus, Greece, Turkey and the United Kingdom,

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[1] 217 UN Treaty Series, p. 224 (No. 2949).

[2] The Commission's report, "The Challenge of Enlargement: Commission Opinion on Austria's Application for Membership" is in *Bulletin of the European Communities*, Supp. 4/92. There is a section (at pp. 15-18) dealing with the question whether Austria, as a permanent neutral, could carry out its obligations under the EU treaties. It concluded that there were problems, but not insuperable ones. It did not address the question in point here, which is the compatibility of membership with Article 4 of the State treaty. The probable reason will be seen shortly.

and this is presumably the basis for it being argued that the Austrian case is a precedent. It is not, however, for the following reasons.

1. The other parties to the State Treaty did not object to accession. The undertakings in Article 4 were all on Austria's part, and the promissees were the other four States. The United Kingdom and France, as members of the EU, did not object to accession and neither, evidently, did the United States. The Soviet Union did, initially, express some anxiety about the compatibility of permanent neutrality with EU membership, but following an official visit to Moscow in October 1988, Austrian Chancellor Vranitsky reported that the Soviet Union had indicated that it would not seek to block Austria's application for full membership of the EC.[3] It is a well-established principle of international law that the parties (that is, *all* the parties) to a treaty can waive a breach (or possible breach) of it if they choose, and clearly that was the case here. This makes the case of Austria entirely different from the present one, where one party to the Treaty of Guarantee, Turkey, has made it very clear that it does not waive any breach by Cyprus (or the other parties) of the Treaty.

This is a sufficient reason in itself why the Austrian example is irrelevant to the present case. It seems so self-evident that I did not mention the Austrian case in my Opinion, and it makes it strictly unnecessary to go into further arguments. However, for the sake of completeness I shall do so.

[3] 35 *Keesing's Record of World Events* (1989), p. 36431.

2. The precise content and the context of Article 4 is different from that of Articles I and II of the Treaty of Guarantee. The former refers specifically and exclusively to Germany, whereas the latter refers to "political or economic union with *any other State*". Moreover, the history, the very heading "Prohibition of Anschluss", and the references to such matters as the prohibition of pan-German propaganda all make clear that what the draftsmen had in mind was a *de jure* or *de facto* union with (incorporation into) Germany - and Germany alone. This is again a difference. Furthermore, whilst the drafters of the Treaty of Guarantee and associated instruments clearly intended to exclude Cyprus from membership of international organizations unless both Greece and Cyprus were members, no such provision was made in the Austrian State Treaty, and indeed Austria was a member of organizations like the European Free Trade Area, of which three of the other four Powers were not members, from an early date and without objection.

3. It is at least arguable that, in the case of Austria, there had been a fundamental change of circumstances since 1955. I am not referring here to the development of the EU, which I have already explained is not sufficient to justify the invocation of the doctrine *rebus sic stantibus*, but to changes in the fundamental structure of international relations in central and eastern Europe. The Austrian State Treaty was concluded during the Cold War, when Europe was divided into two intensely hostile blocks, when even Germany was divided, and when memories and fears of German revanchism etc. were still strong. In the circumstances, the insistence on permanent neutrality and on non-unification with Germany is easily comprehended. But by the time Austria joined the EU, the world had greatly changed. Germany was reunited

and a democratic country. The Cold War had come to an end, Europe was no longer divided, and indeed even the Soviet Union no longer existed. It is at any rate arguable that the circumstances had changed so radically that Austria was no longer bound by its undertakings. It is unnecessary to pursue this point because of the acquiescence of the other parties to the State Treaty discussed at 1 above; but it may be pointed out that the changes just referred to, though relevant to the case of Austria, are completely irrelevant to the case of Cyprus.

4. Finally, two wrongs do not make a right. I have indicated above what seem to be good and clear reasons why the case of Austria is different from that of Cyprus, and specifically why the admission of the former to the EU did not entail a breach of its international obligations (or those of the UK and France, as members of the EU and parties to the State Treaty). But even if this reasoning were regarded for any reason as incorrect, and the admission of Austria is considered to have been inconsistent with Article 4 of the State Treaty or with its obligation of permanent neutrality, then this cannot possibly provides a justification for a similar breach in the case of Cyprus. Two wrongs, I repeat, cannot make a right; and Turkey, who was not a member of the EU nor a party to the Austrian State Treaty, did not in any way connive or acquiesce in any such breach. Therefore it is not precluded from complaining on this occasion.

However, as already indicated points 2 to 4 are merely subsidiary arguments mentioned for the sake of completeness; a sufficient basis of differentiation is that mentioned in point 1, viz., the acquiescence of the other parties to the State

Treaty in Austria's accession. That is fundamentally different from the case of Cyprus.

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